150 2562

RECORD, CASE NO. 15149.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1179~~. 821

FRANK COLLINS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 29, 1892.

Wheat., 213, 220.) "Such a motion is not a part of the proceedings in the cause; it is an application to the discretion of the court." (*United States* v. *Daniel*, 6 Wheat., 542, 548, *per* Marshall, C. J.), and for this reason was held not a proceeding, a difference of opinion upon which could be certified under the act of April 29, 1802. (*Id.*)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

150 U.S. 62

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

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a IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States in and for the western district of Arkansas, holding circuit court. In the case of—

UNITED STATES *vs.* FRANK COLLINS. } Indicted for murder.

1 UNITED STATES OF AMERICA, WESTERN DISTRICT OF ARKANSAS.

In the circuit court, February term, A. D. 1892.

UNITED STATES *vs.* FRANK COLLINS. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Frank Collins, a negro and not an Indian, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Randle Lovely, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Frank Collins, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun he, the said Frank Collins, in his hand, then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said Randle Lovely, and that the said Frank Collins, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Frank Collins, discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Randle Lovely, in and upon the right side of the breast of him, the said Randle Lovely, giving to him the said Randle Lovely, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid, by the said Frank Collins, in and upon the right side of the breast of him, the said Randle Lovely, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said Randle Lovely, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Frank Collins, him the said Randle Lovely, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Indorsed:) No. 36. United States vs. Frank Collins. Murder. A true bill. Lewis R. Hawkins, foreman. Witnesses: Sam Steadman, Ft. Gibson, I. T.; Ed. Ross, Ft. Gibson, I. T.; Dave Rider, 4 miles N. of Ft. Gibson, I. T.; Jonas Thompson, 5 miles east of Ft. Gibson, I. T.; John Varns, Ft. Gibson, I. T.; N. M. Thornton, Ft. Gibson, I. T.; Harry Nave, Joplin, Mo.; Frank Hudson, Ft. Gibson. Filed Feb'y 9th, 1892. Stephen Wheeler, by I. M. Dodge, D. C. Clerk.

2 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

February term, 1892.

TUESDAY MORNING, *Feb. 9th*, 1892—8½ o'clock.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES } Indictment for murder. No. 36.
vs.
FRANK COLLINS. }

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

On this day, by agreement of parties, it is ordered by the court that this cause be and the same is hereby continued to the next term of this court, and set down for trial May 9, 1892.

TUESDAY, *April* 12, 1892.

(Caption omitted.)

On this day come the said defendant by his attorney and files his application in writing verified upon oath, praying for witnesses in his behalf at the expense of the United States.

WEDNESDAY, *April* 13, 1892.

(Caption omitted.)

3 On this day come on to be heard the application for witnesses in this cause, filed April 12, 1892, and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Alex. Kemp, Bill Bates, Manuel Vann, Doog Webber, J. E. Davis, Tom Dilwood, and Walter Shannon, in behalf of said defendant be paid by the United States and that a subpœna be issued for them returnable May 9th, 1892.

TUESDAY, *April* 26, 1892.

(Caption omitted.)

Ordered by the court that the following case now pending be continued and set down for trial as follows to wit:

No. 36. Frank Collins. Murder. July 9, 1892.

WEDNESDAY, *Aug.* 10, 1892.

(Caption omitted.)

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff by its attorney, ordered by the court that the jury come to try the issue joined.

4 Whereupon the clerk called the entire panel of the petit jury, and after challenge by both plaintiff and defendant, the following were selected for the trial of this cause, to wit: James Harrison, David C. Jones, Burton H. Moore, John K. Mount, Wm. F. Mayo, John M. Shaver, Henry M. C. White, Winfield W. West, Jourdan D. Wilson, John A. Yeaden, Redmon B. Yeager, Hiram C. Reese.

Twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issues joined, and a true verdict render according to the law and the evidence, and after hearing the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *Aug.* 11, 1892.

(Caption omitted.)

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford, and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: James Harrison, David C. Jones, Burton H. Moore, John K. Mount, Wm. F. Mayo, John M. Shaver, Henry M. C. White, Winfield W. West, Jourdan D. Wilson, John A. Yeaden, Redmond B. Yeager, Hiram C. Reese, who took their seats in the jury box, and after hearing the argument of coun-

sel, and receiving the charge of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty of murder as charged in the within indictment."

(Signed) B. H. MOORE,
Foreman.

Whereupon the jury was by the court discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await final sentence.

FRIDAY, *Aug.* 19, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and files his motion to set aside the verdict of the jury, and for a new trial in this cause.

TUESDAY, *Sept.* 13, 1892.

(Caption omitted.)

On this day come on to be heard the motion, heretofore filed by the defendant, to set aside the verdict of the jury and for a new trial in this cause, and the court, being well and sufficiently advised in the premises, doth overrule said motion.

6 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

August term, 1892.

MONDAY MORNING, *Sept.* 19, 1892—8½ *o'clock*, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* FRANK COLLINS. } Indictment for murder, No. 36.

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant Frank Collins was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 11th day of August, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and suffiicently understood, it is considered by the court that the said marshal of the district aforesaid, cause the said Frank Collins to be taken hence, and him, the said Frank Collins, safely and securely keep, from the date hereof until Wednesday, the 2nd day of November, 1892, and on that day between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Frank Collins to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in
7 the forenoon and five o'clock in the afternoon, on Wednesday, the said day of November, in the year of our Lord one thousand, eight hundred and ninety-two, cause the said Frank Collins to be hanged by the neck until he is dead.

8 MONDAY, *Sept.* 19, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors, and petition for writ of error to the Supreme Court of the United States together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

9 *Bill of exceptions.*

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

August term, 1892.

UNITED STATES }
vs. }
FRANK COLLINS. }

Be it remembered that on this the 10th day of August, 1892, came on to be tried this case.

Came the United States and the Hon. W. H. H. Clayton, who prosecutes for the plaintiff, and also came the defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford.

The United States to maintain the issues on its part introduced the following-named witnesses: Sam Steadman, Ed. Ross, Dave Rider, Jones Thompson, John Vann, Henry Nave, Frank Hudson, who testified as follows, to wit:

10 SAM STEADMAN, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. What is your name?

Answer. Sam Steadman.

Q. Where do you live?

A. Fort Gibson, Cherokee Nation, I. T.
Q. Gibson Station is in the Creek Nation?
A. Yes, sir.
Q. Do you know Frank Collins, the defendant in this case?
A. Yes, sir.
Q. How long have you known him?
A. I have known him ever since he was a little fellow about that high.
Q. Is he a citizen of the Cherokee Nation?
A. No, sir.
Q. Did you know Randall Lovely in his lifetime?
A. Yes, sir.
Q. Where did he live?
A. Fort Gibson.
Q. Is he alive or dead?
A. He is dead.
Q. Were you present at the time that he was killed?
A. Yes, sir.
Q. Where was it?
A. At Fort Gibson.
Q. At what place in Fort Gibson?
A. It was in a house there they call the Valley House; it was used for a hotel once; used for a little store for awhile.
Q. When was it?
A. This last July was a year ago.
Q. What time in July?
A. I don't remember the exact date; somewhere towards the last part of July.
Q. What were you doing there?
A. They had a dance there that night, and there was a little political tour on, and I was out seeing what I could scrap' up in that direction.
Q. You were scrapping for politics?
A. Yes, sir.
11 Q. You say they had a dance at that place?
A. Yes, sir.
Q. Was Henry Lively there and the deceased?
A. Yes, sir.
Q. The defendant is charged with killing him; please state now all you know about it?
A. I was present at the time when Randall was slapping after his brother——
Q. That is the deceased, Randall Lovely?
A. Yes, sir.
Q. How did that occur?
A. From what I could understand, it occur'ed——
Q. Tell just what you know—what you saw?
A. Why, he purchased a bottle of soda pop, and he refused to pay for it. I saw him when he slapped at Honey—we call him Honey generally; he is a brother of the defendant.
Q. A little boy?
A. Yes, sir.
Q. Did he slap him?

A. I saw him making a slap across the table. I don't know whether he struck him or not with his open hand. When I saw that I goes down there, or, at least I starts down there, to get this man out and get him sober.

Q. He was drunk, was he?

A. Yes, sir; he seemed to be feeling pretty good. And just before I got there Frank steps up near to him on my right and pulls down on him.

Q. The defendant?

A. Yes, sir.

Q. What do you mean by pulling down?

A. Pulled his six-shooter down on him and fired.

Q. Did he say anything before he fired?

A. Not that I know.

Q. Was he standing in front or behind him?

A. Standing in front of Randall Lovely.

Q. Right in front of him?

A. Yes, sir.

12 Q. Pulled his six-shooter down on him and fired?

A. Yes, sir.

Q. Without saying anything?

A. I never heard him say anything.

Q. Where did he get his six-shooter? Do you know?

A. No, sir.

Q. How close were you standing to him?

A. I guess about as close as to that table (about 10 feet).

Q. How close was he to Randall?

A. About as close as that table.

Q. About 12 or 15 feet?

A. Yes, sir; maybe a little more than that.

Q. When he fired at Randall what did Randall do?

A. He fell.

Q. Did he say anything?

A. Randall just throwed up his head that way and says to me "Catch him;" I don't know whether he meant——

Q. You know what he said?

A. Yes, sir.

Q. What did the defendant do?

A. He walked about five or 6 steps, I guess, behind me from the way that he came, and he fired the next shot; and he said when he fired it, "I will learn you how to cut up my brother with a knife."

Q. Did he go back towards him to fire or stand where he was?

A. He didn't go back any closer than he did to the place where he made the first shot.

Q. He walked back—came back that close and fired?

A. Yes, sir.

Q. Did he say anything else?

A. Not that I know of.

Q. Did you hear him say anything else about finishing him?

A. No, sir.

Q. He said: "I will show you how to cut my brother with a knife?"

A. He said: "I will learn you how to cut up my brother with a knife."
Q. Did Randall cut at his brother with a knife?
A. I didn't see any.
13 Q. Did you see a knife in his hands?
A. No, sir.
Q. Did you go up to where he was?
A. No, sir.
Q. You did not see any knife there then?
A. No, sir.
Q. Why didn't you go up there to where the man that was shot was?
A. I was kind of excited when the shot was fired first, so I wouldn't go up to him to examine him to see what he had.
Q. You did not go up to him at all?
A. No, sir.
Q. Where was he shot?
A. I could not say where.
Q. What is the reason you didn't go up to him?
A. I didn't think I had any right to go up to him. I didn't have any business about him, so I didn't go up to him.
Q. You saw no knife?
A. No, sir.
Q. You saw him slap with his open hand?
A. Yes, sir.
Q. And you heard the defendant say, "I will learn you how to cut my brother with a knife"?
A. Yes, sir.
Q. How far was he from the boy at that time, Randall?
A. I guess he was about probably 8 or 10 feet from him.
Q. You say that the defendant was standing right in front of him?
A. Yes, sir.
Q. Was he between him and the boy; was he standing between the two when he fired?
A. No, sir.
Q. Then Randal was not facing the boy?
A. No, sir; he was merely facing Frank there.
Q. The two were facing each other?
A. Yes, sir.
Q. Was his back towards the boy, or his face towards him?
A. His left side was towards the boy.
Q. His left side was towards the boy and facing the defendant?
A. Yes, sir.
14 Q. When the defendant first fired?
A. Yes, sir.
Q. How far did he walk off before he came back?
A. I think he walked about 5 or 6 steps, maybe not quite so many.
Q. Then walked back to the same place?
A. Yes, sir.
Q. Where was Randall when the defendant fired the second shot?
A. He was down on the floor against the table that the confestionery was on.
Q. What was he doing?

A. Leaning up against the wall, partly, and partly laying on the floor. He fell sort of against the wall like?

Q. Did he die?

A. Yes, sir.

Q. How do you know?

A. I saw him laid out.

Q. When?

A. Right away.

Q. He only spoke one word when he was first shot?

A. Yes, sir.

Q. How long after he spoke that word was it, "Steadman catch him," until Collins came back and fired upon him again?

A. I don't think it was over two or three minutes.

Q. He was then lying down on the floor, was he?

A. Yes, sir.

Q. Do you know where the second shot struck?

A. No, sir.

Q. Did you ever see his hat?

A. No, sir.

Q. So they laid Randall out, did they?

A. Yes, sir; stretched him out on the floor.

Q. What became of the defendant?

A. I never saw him any more after the second shot was fired by him; he walked out of doors then.

Q. Did he say anything when the second shot was fired by him?

A. No, sir; not that I heard.

Q. What did he do?

A. I suppose that he left the house; I never saw him any more.

15 Q. Did you ever see him after that until he was arrested?

A. No, sir.

Q. He left the country, did he?

A. I suppose so; I never heard anything more of him.

Q. Did he have a family there?

A. Yes, sir.

Q. How much of a family?

A. A wife.

Q. She was living with him?

A. Yes, sir.

Q. Did she leave with him?

A. No, sir.

Q. She did not leave when he left?

A. No, sir.

Q. Do you know whose pistol it was that he shot with?

A. No, sir.

Q. Or where he got it?

A. No, sir.

Q. Do you know Frank Hudson?

A. Yes, sir.

Q. Was he there?

A. If he was I didn't see him.

Q. You don't know whether he was there or not?

A. No, sir.
Q. You don't know where the defendant got his pistol?
A. No, sir.
Q. This was in the Cherokee Nation?
A. Yes, sir.
Q. In the Indian country?
A. Yes, sir.
Q. It occurred last July was a year ago?
A. Yes, sir.
Q. Do you know where it was that the defendant was arrested?
A. No, sir; I don't know exactly.
Q. How long after that was it until you saw him again?
A. I guess it must have been 5 or 6 or 7 months, I reckon.
Q. Was it not longer than that?
A. It may have been a little longer than that.
Q. November, 1891, is when he was tried before the commissioner, and that was in July a year ago?
A. Yes, sir.

16 Cross-examination by Mr. C. J. FREDERICK:

Q. You say you have known Frank ever since he was a little boy?
A. Yes, sir.
Q. Where does he live?
A. At Fort Gibson.
Q. You live there?
A. Yes, sir.
Q. Do you know how old Frank is?
A. I think he is between 17 and 18 years of age, I should judge.
Q. Do you know his general reputation there in that community as to being a peaceable, law-abiding young man?
A. His reputation was always stand good.
Q. Do you know the general reputation of Randall Lovely as to being peaceable or violent?
The DISTRICT ATTORNEY. I object to that.
The COURT. I do not think there is any state of case that authorizes proof of that kind as yet. General bad character can only go on as an illustrative fact. There must be some other substantative fact that it illustrates—that is, some fact showing at the time that he was performing or attempting to perform some lawless, desperate act; then character in that way may go in as illustrative of that act, but the act must be proven first.
Mr. FREDERICK (of counsel for defendant). I will ask you whether or not if you know that Lovely was friendly with Frank at that time, the defendant, and before that time?
A. I could not say.
Q. You don't know what the relations were between them?
A. No, sir.

17 Q. Or what the feeling was?
A. No, sir.
Q. I will ask you if recently, before this killing, if you heard Randall Lovely make threats of violence against this man?

The DISTRICT ATTORNEY. I object to that.

The COURT. That, upon the same ground, stands as a fact that can not be admitted until the other fact is proven. You ought to offer the other evidence first, and then you can recall this witness if you want to offer him.

Mr. FREDERICK (of counsel for defense). Was there many people there at that dance that night?

A. There was quite a little crowd of them.

Q. You had gone down there to do a little political work?

A. Yes, sir.

Q. You were a candidate for an office, were you?

A. No, sir; I was kind of working in that direction for somebody else.

Q. You were working for another?

A. Yes, sir.

Q. You were not seeking office, but soliciting votses for oth'r people?

A. Yes, sir; seeing how the business stood generally.

Q. In the Cherokee Nation?

A. Yes, sir.

Q. That was your business down there?

A. Yes, sir.

Q. Do you know what Randall Lovely was down there for?

A. No, sir.

Q. How old a man was he?

A. I expect he was about 20, or maybe 22.

Q. Not older than that?

A. He might have been a little older than that; that is what I would judge him to be.

Q. Was he a married man?

A. Yes, sir.

Q. Had a family?

A. Yes, sir.

18 Q. You say that he was drunk that night?

A. I think he was feeling pretty good.

Q. Do you mean to tell me by that, when you saw him he was intoxicated?

A. Yes, sir.

Q. What was he doing and saying that lead you to believe that he was intoxicated; how did he act?

A. He seemed that he could not walk very straight; was staggering, and I think probably he had been drinking something that was a little intoxicating.

Q. Could you tel' it by his talk?

A. Yes, sir.

Q. What was his manner; what was he doing; what was he saying at that dance that night prior to this killing?

A. When I first saw him he was doing nothing more than talking and joking, first about one thing and then another.

Q. You did not see him in any difficulty at all until you saw him in this difficulty with this little boy?

A. No, sir.

Q. What was the boy doing; Frank's brother?

A. Standing behind the table selling soda pop or some little confectionery of some kind.

Q. They had a soda pop or confectionery stand there inside of the building?

A. Yes, sir.

Q. On the same floor with the dance?

A. Yes, sir.

Q. Who was owning the stand?

A. I think it was owned by a fellow named Dillwood.

Q. Honey was running it?

A. Yes, sir.

Q. You cal' the defendant's brother Honey?

A. Yes, sir.

Q. How old a boy was he?

A. I guess he is about 12 or 13.

Q. He is here, is he not?

A. Yes, sir.

Q. What was it you saw him do to the boy?

A. Slap at him.

19 Q. How near were you to him, to Randall, when he first slapped at the boy?

A. I was about as close as I am to that gentleman over there (indicating about 15 feet).

Q. Did you hear him say anything?

A. No, sir.

Q. Where was the boy with regard to the table; behind the table or how?

A. Yes, sir; he was behind the table.

Q. How was the table setting, near the wall or how?

A. Near the wall.

Q. What did the boy do when he slapped at him?

A. I saw his hands go up that way, like he was defending the lick from his face, and got back towards the window like.

Q. Did you hear Randall say anything?

A. No, sir.

Q. Did the boy?

A. No, sir.

Q. Didn't hear any words?

A. No, sir.

Q. You started towards him?

A. Yes, sir.

Q. How far did you get to himm before he was shot?

A. About as close as the corner of the table there (indicating 5 or 6 feet).

Q. Did you hear anything said at that time by any one?

A. No, sir.

Q. Did you say anything?

A. No, sir.

Q. Did you call to Randall about it?

A. No, sir.

Q. Hadn't you took him out of there before that night?
A. No, sir; that was my first trip inside.
Q. You say you had started down to make him behave himself?
A. Yes, sir.
Q. What was Randall doing when Frank shot him; where was the boy and where was the table, and where was Randall when Collins shot him?
A. The boy was on the side of the table, near the window; looked like as if he was trying to get out of the window; Randall had walked
20 to the corner of the table as if he was going around after him; he was just kind of squeezing himself around when he received the shot.
Q. Going towards the boy?
A. Yes, sir.
Q. Did you see him with anything in his hand?
A. No, sir.
Q. Didn't you see him with a fork in his hand?
A. No, sir.
Q. Could you tell what he had in his hand?
A. I saw him with his open hand; didn't have anything in it.
Q. Which hand was open?
A. Right hand.
Q. Did you see where the left hand was?
A. No, sir.
Q. You could not tell?
A. No, sir.
Q. Suppose this is the table; I am where Lovely was, and the boy would be over on that side?
A. Yes, sir.
Q. You say he was going around, trying to squeeze himself in between the table and the wall at the end of the table, next to the wall?
A. Yes, sir.
Q. And the boy was over there at the window?
A. Yes, sir.
Q. Which way was the window?
A. On the back side of the table. The table set in the house just like these two tables are setting here, and Walter was on that side of the table, and the window on the same side.
Q. Where did Frank come from to shoot him?
A. He come from in behind to my right.
Q. What was Frank doing when you first saw him?
A. I did not see him until he fired.
Q. How near were you to him?
A. As near as you and I are now (indicating about 12 feet).
Q. The boy was over there near the window?
A. Yes, sir.
Q. Lovely was trying to get around the corner of the table?
A. Yes, sir.
21 Q. Which side was he shot on?
A. I don't know; I never examined.
Q. When he fell, you say that he fell against the wall?

A. He gave right down.
Q. Where did Frank go?
A. I think Frank walked back about 5 or 6 steps, right back that way, and turned himself and again fired.
Q. Did he walk back towards his again afterwards?
A. He walked back up as far as even with him, and firsed the second shot.
Q. What was it that he said?
A. "I will learn you how to cut up my brother with a knife."
Q. You don't know whether Lovely had any arms or not?
A. No, sir; I do not.
Q. You did not go to him?
A. No, sir.
Q. All you heard him say was "Catch him?"
A. Yes, sir.
Q. Who was there?
A. I could not mention who all was there.
Q. Mention those you remember.
A. I don't know exactly who was present; there was a good many of them there.
Q. You can name some of the persons who were present?
A. I remember Dave Rider, and I think I remember Ed. Ross, and I think I remember Walter Shannon.
Q. Walter Shannon is the defendant's brother, the boy they sometimes call Honey, and the boy you refer to in your testimony?
A. Yes, sir.
Q. You know that he was there?
A. Yes, sir. And a fellow by the name of Newton Blue was there.
Q. Is he here?
A. No, sir.
Q. Ed. Ross is here, is he not?
A. Yes, sir.
22 Q. Dave Rider is here, is he not?
A. Yes, sir.
Q. Was Aleck Kemp there?
A. I could not say; I never saw him.
Q. Was Dude Weber there?
A. I never saw him.
Q. Emanuel Vann?
A. I never saw him.
Q. Tom Dillwood?
A. I never saw him.
Q. J. E. Dawn?
A. I never saw him.
Q. Bill Bates?
A. I never saw him.
Q. You don't know whether they were there or not?
A. No, sir.
Q. Where was Ross at the time the shooting was done?
A. I do not know where he was right at the time of the shooting; I only saw him when I first came in the house.

Q. How long had you been in the house before the shooting occurred?
A. I guess about 20 minutes.
Q. Along in front of the door there, or had you been out talking to Nick Thornton? Nick Thornton is here, is he not?
A. No, sir.
Q. Did you see Ed. Ross any more after you went to the house?
A. I saw him when I first went in; I never saw him any more afterwards.
Q. What was he doing?
A. It seemed like he was fixing for a dance; I would not be positive.
Q. What was Frank Collins doing when you went in?
A. I don't know, sir.
Q. Did you see him in the dance at all?
A. I saw him once on the outside of the door.
Q. You were on the outside of the door?
A. Yes, sir; that is the first time I ever saw Frank, before the dance taken place; I never saw him any more until the shot fired.
Q. After the shooting occurred you say you never saw him any more until he was arrested?
A. No, sir.
23 Q. You don't know where he went to?
A. No, sir.

Redirect examination:

The DISTRICT ATTORNEY. This was last July was a year ago?
A. Yes, sir.
Q. How long had Frank been married?
A. I don't know exactly that I could say positively.
Q. Did he have any children?
A. Not that I know of.
Q. And what did you say his age is?
A. I think he was 18 years old.
Q. They marry pretty young up there?
A. Yes, sir.
Q. How old are you?
A. I was born 25th of March, 1860.
Q. How much older are you than he?
A. I don't know, sir.
Q. You and he were boys together, were you?
A. I have known him ever since he was pretty small.
Q. How big a boy were you when you first knew him; about 10 years old?
A. Yes, sir.
Q. Did you help bury Randall?
A. No, sir.
Q. Then you think Randall was about 22?
A. Yes, sir; I think he was; I would not be certain.
Q. Was he married?
A. No, sir.
Q. Not near as big a man as you, was he?
A. He was kind of heavy-set fellow; but, still, he was nothing in comparison with my size.

Recross-examination:

Mr. FREDERICK. How much would Randall weigh?

A. 140 or 150.

Q. You weigh 200?

A. Yes, sir.

Q. He was a bigger man than this little boy, was he not? You say that the boy was about 12 years old?

A. Yes, sir.

24 ED. ROSS, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Ed. Ross.

Q. Where do you live?

A. Fort Gibson.

Q. Do you know this defendant?

A. Yes, sir.

Q. Did you know Randall Lovely in his lifetime?

A. Yes, sir.

Q. Were you present at the time that he was killed?

A. Yes, sir.

Q. Who killed him?

A. Frank Collins.

Q. At what place?

A. At the Valley House, in Fort Gibson, Cherokee Nation.

Q. When was it?

A. 17th of last July was a year ago.

Q. Go on and state all that happened there.

A. They had a dance there, and Randall Lovely came in kind of intoxicated——

Q. Anybody come in with him?

A. Yes, sir.

Q. Who?

A. There was two or three. Nick Thornton was one of them. After they came in Frank Collins started home with his wife, and Henry Nave begged him not to go, to come back, there wasn't but four women there, so they could have his wife to dance. They kept begging him, and after awhile they got Frank in the notion to come back, and Frank turned around and he came back and got on the floor to dance, and Lovely went up to the bar and called for a glass of soda pop.

Q. Did he get it?

A. Yes, sir.

Q. Who did he get it from?

A. Honey, or Walter Shannon.

Q. The little boy?

25 A. Yes, sir. When he got that he called for another, and when he got that he walked off, and the little boy contended for the pay; asked him for it; and Randall would not pay him, and he got to jawing around, and the little boy said Randall would not do it if he wasn't a man and he a little boy; and Tom Dillwood said to the little boy, "Let

him alone; I will get it from him." And directly after that I saw Randall slap this little boy with his open hand, and directly Frank Collins he run over to that side of the house, over here where Randall was at this little boy, and he ran back down that way and got his pistol.

Q. Where did he get it?

A. Out of Frank Hudson's pocket.

Q. What was he doing?

A. Laying down asleep, I guess.

Q. He went to him and got the pistol from where?

A. Out of his pocket.

Q. Breast pocket?

A. Coat pocket, inside.

Q. What did he do then?

A. After he got his pistol he came back and fired it.

Q. What was Randall doing when he fired it?

A. He was after his brother.

Q. How close to his brother was he?

A. I don't know, sir; about as close as to that gentleman there [indicating about 8 feet].

Q. Did Randall have any arms?

A. I didn't see any weapons.

Q. You would have seen them if he had had them, wouldn't you?

A. I guess I would have.

Q. Go ahead.

A. After he came back he fired.

Q. How close did he get to him?

A. I don't know how close he got to him. About as near as to that gentleman over there (about 12 feet). There were several between he and me when the shot fired.

26 Q. When the shot fired, what did Randall do?

A. He sank down, and he said, "Steadman, catch him."

Q. What did Collins, the defendant, then do?

A. He turned around and walked off a peice and then turned around and shot again.

Q. How did he do that second shot?

A. He came back and fired the second shot.

Q. How far back did he come?

A. I could not tell you how far back he did go.

Q. How close to Randall did he go when he fired the shot?

A. He went about that close [indicating 4 or 5 feet.]

Q. State how he fired it?

A. Right down that way.

Q. How close was the muzzle to his head?

A. I could not tell you; there was men between me and them.

Q. Did the defendant say anything?

A. Yes, sir; he said, "I have pretty near killed him; I may as well finish him; I will learn you how to cut my brother."

Q. Did he say that after he turned around to come back, after he fired the first shot?

A. After he fired the second shot.

Q. After he turned to come back or before?

A. After he turned.
Q. He said what?
A. "I will learn you how to cut up my brother."
Q. What was it that you said that he said about finishing him?
A. He said, "I pretty near killed him; I will finish him; I will show him how to cut up my brother."
Q. After he fired the second shot or before?
A. After he fired the second shot.
Q. Where did the second shot go?
A. Right in his hat here by the rim; across the back of his head.
27 Q. What was Randall doing then?
A. He wasn't doing anything; he was between the wall and the table.
Q. Alive or dead?
A. Gapping; he was gapping.
Q. Did he ever speak any more?
A. No, sir.
Q. How long did Randall live?
A. He lived about 10 minutes. We ran out of the hall and came back in again. Dave Rider said, "Boys, it is a shame to leave that man drawed up there——."
Q. You went out and came back; did you find him dead when you came back?
A. No, sir; still gapping.
Q. How long was it before you went back?
A. It was about five or ten minutes; somewhere along there.
Q. He didn't say anything?
A. No, sir.
Q. How long did he live after you got back?
A. Not so very long; we pulled him out and stretched him out on the floor.
Q. Where was he shot?
A. Right on his neck; right along here.
Q. Down upon the lower part of his neck?
A. Yes, sir.
Q. On the right hand side?
A. Yes, sir.
Q. You were there when he died, were you?
A. Yes, sir.
Q. You saw the place where his head was grazed, and the hole through his hat?
A. Yes, sir.
Q. What became of Collins after that?
A. I don't know; I never saw him any more. His wife went out of the door with him.
Q. Did he leave the country?
A. I don't know whether he left it or not; I never saw him any more.
Q. He had a wife about there?
A. Yes, sir.
Q. You did not see him any more about Fort Gibson?

A. No, sir.
Q. Who was the man that he got the pistol from?
A. Frank Hudson.
28 Q. Did Randall say anything to the defendant before he shot him?
A. I don't know whether he did or not.
Q. Did you that you heard?
A. I never heard him say a word.
Q. You have told all that you heard said, have you?
A. Yes, sir.
Q. When you came back in there and found Randall lying there, did you see a knife?
A. No, sir.
Q. Or any weapons lying around?
A. No, sir.
Q. Did you examine his pockets?
A. Yes, sir.
Q. What did you find in his pockets?
A. Stable keyes and two cigars.
Q. No knife about there?
A. No, sir; didn't see him have any.
Q. When he struck the boy you say that he struck him with his open hand?
A. Yes, sir.
Q. Was there a lamp or light in the room?
A. Yes, sir.
Q. What is the name of the owner of the place there—the one that gave the dance?
A. Tom Dillwood.
Q. You say that the defendant fired one shot and turned and went away?
A. Yes, sir.
Q. How far did he get off before he turned and went back?
A. He went about as far as from me to Mr. Frederick (about 15 or 18 feet).
Q. Did he say anything when he went off, after shooting—the first time that he went off?
A. When he went off and turned, he said, "I pretty near killed him, and I am going to finish him."
Q. What did he do then?
A. Turned around and went back.
Q. Then it was after the first shot was fired he said, "I pretty near killed him; I may as well finish him?"
A. Yes, sir.
Q. After the first shot?
A. Yes, sir.
29 Q. Then he turned around and fired the second shot?
A. Yes, sir.
Q. That is the way you stated it before the commissioner, but you didn't state it that way while ago. He fired the second shot as you have described?

A. Yes, sir.
Q. At that time Randall was gapping?
A. Yes, sir.
Q. How was he lying when the second shot was fired?
A. He wasn't laying; he was down between the wall and the table; he was squatted down as if he was hiding from somebody; it was so close that he could not lie down.
Q. You do not mean by that that he was hiding?
A. No, sir.
Q. You meant to illustrate it?
A. Yes, sir.

Cross-examination:

Mr. C. J. FREDERICK. Did you go there with Lovely?
A. No, sir; I was already there.
Q. You and Frank Collins, and Walter Shannon, the little brother of the defendant, were already there?
A. Yes, sir.
Q. And several others?
A. Yes, sir.
Q. And Frank's wife?
A. Yes, sir.
Q. Some other women?
A. Yes, sir.
Q. Who came there with Randall?
A. There was Mr. Steadman, Henry Nave, and Nick Thornton was there.
Q. You say Randall was intoxicated?
A. Yes, sir; pretending like he was.
Q. What was he doing?
A. Staggering around.
Q. What was he doing and saying?
A. He was cursing, like anybody *anybody* else would curse.
Q. Did he dance?
A. I don't know whether he danced or not.
Q. How long had the dance been going on before he was shot?
A. I don't know, sir.
Q. How long had he been there before he was shot?
A. I don't know, exactly.
Q. Had he been there 15 minutes?
A. Longer than that.
Q. An hour?
A. About half an hour, I suppose, or three-quarters.
Q. You say after Lovely got there and went to cursing around the defendant left, or started to leave, did he?
A. Yes, sir.
Q. Started off with his wife?
A. Yes, sir.
Q. Who was it begged him to come back?
A. Henry Nave.
Q. Did Randall beg him to come back?

A. No, sir.
Q. Did Randall say anything to Frank when he came in?
A. I do not know whether he did or not; I never heard him.
Q. Did Frank say anything to him?
A. No, sir; not that I heard.
Q. Was he cursing when he was in the house?
A. Yes, sir.
Q. He went up and got a bottle of pop from the little boy?
A. Yes, sir.
Q. Paid him for it and went off and drank it?
A. He drank it right there.
Q. He went and got another bottle, did he?
A. Yes, sir; afterwards.
Q. How long afterwards?
A. I don't know how long.
Q. Did he leave the stand before he got the other bottle?
A. Yes, sir.
Q. What was he doing after he drank that bottle of pop; still cursing around there?
A. Walking around.
31 Q. Cursing around?
A. No, sir; I didn't hear him curse any.
Q. After he drank the pop he then went back to the stand again?
A. Yes, sir.
Q. Who was with him then?
A. He was by himself.
Q. Who was at the stand?
A. Blue and Honey.
Q. You mean by Honey, Frank's little brother?
A. Yes, sir.
Q. His name is Walter Shannon, is it not?
A. Yes, sir.
Q. He went there and got another bottle of pop; what did he do with the bottle?
A. He drank it?
Q. You say that he got to quarreling with the boy about the pay?
A. He asked him for the pay and he said to the boy he wasn't going to pay him.
Q. What were his words, he wasn't going to pay him?
A. He said "I'm not going to pay you."
Q. What did the little boy say to him then?
A. He said "Come on and pay me; do*mn*'t use me that way because I am a boy and he was a man.
Q. What did Randall say then?
A. He started off, turned off, and Honey went around after him, and Tom Dillwood came up there, and Honey told him, and he said "Let him alone, and I will get it."
Q. Did the boy go back then?
A. Yes, sir.
Q. What did he do then?
A. I looked again and he was after the boy.

Q. Was he doing anything to him?
A. He was slapping at him.
Q. Where was the boy when he was slapping at him?
A. Behind the table.
Q. Where was Randall when he was slapping at him?
A. He was going around there at that time, between the table and the wall.
32 Q. Did you see him hit the boy?
A. No, sir.
Q. What was the boy doing?
A. The boy was going back.
Q. What was Randall say'ng?
A. I could not understand.
Q. Was he cursing?
A. I could not tell you whether he was cursing or not.
Q. What was the little boy saying?
A. He was getting back from him.
Q. Did he say anything?
A. I don't know whether he did or not.
Q. Where was Tom Dillwood then?
A. He was out there in the hall.
Q. He wasn't close to them?
A. No, sir.
Q. When was it that Frank shot him; when he was slapping at the little boy?
A. Yes, sir.
Q. What was Randall doing when Frank shot?
A. He was after the little boy.
Q. Pressing around between the wall and the little table to get to the boy?
A. Yes, sir.
Q. Anybddy back there with the boy?
A. Newt Blue.
Q. Is he a grown man?
A. No, sir.
Q. A little boy?
A. A young fellow.
Q. Is he here?
A. No, sir; he is in jail.
Q. What was Newt Blue doing around there?
A. He was around back behind the bar with Honey.
Q. What was he saying?
A. He wasn't saying anything.
Q. Did you see Randall with a fork in his hand?
A. No, sir.
Q. Did you see him with a fork at all?
A. No, sir.
Q. Were there any forks there on the table?
A. Yes, sir; I believe there was one there.
Q. Did you see him with it?
A. No, sir.

33 Q. He might have had one and you not see it?
Answer. Yes, sir; I did not see him have any.
Q. How do you know that Frank got the pistol from Hudson's bosom?
A. I saw him run over there, and come back with it.
Q. Saw him coming with the pistol in his hand?
A. Yes, si'.
Q. Did he say anything?
A. I never heard him say anything.
Q. While he was doing this Randall was still after the boy, slapping at him?
A. Yes, si'.
Q. How many men were there then?
A. I could not tell you.
Q. You were there?
A. Yes, sir.
Q. Mr. Steadman was there?
A. Yes, sir.
Q. Tom Dillwood is a man?
A. Yes, sir.
Q. He was there?
A. Yes, sir.
Q. And Nave?
A. Yes, sir.
Q. There was several men there?
A. There was a house full of men there.
Q. Nobody tried to stop Frank?
A. No, sir.
Q. Nobody tried to stop Randall from beating the boy?
A. No, sir; no one said a thing that I know of.
Q. What is the reason you didn't try to stop him from whipping the boy?
A. I can't tell you what is the reason.
Q. What is your reason?
A. I didn't want to have anything to do with them.
Q. You would stand up and see a big man whip a little boy?
A. I wanted nothing to do with no man's fight.
Q. Why did't you try to stop it?
A. Because there was other men there.
Q. You can not give any other reason why you did not try to stop that man from whipping that little boy?
34 A. I had no reasons only because I didn't want to have anything to do with it.
Q. You were afraid of him?
A. No, sir; I didn't feel afraid of him, but I didn't want to get into trouble.
Q. You were not scared of Randall?
A. No, sir.
Q. Tell me why you did not try to stop him from whipping him?
A. I didn't want to stop him; I didn't want to have anything to do with the fight.
Q. You didn't want him to whip that little boy, did you?

A. If I can stay out of trouble I am going to stay out of it.
Q. You didn't even tell him to stop?
A. No, sir; I never opened my mouth.
Q. Several saw him?
A. Yes, sir; a ho'se full of men there.
Q. There was a light there?
A. Yes, sir. Did you ever go to a dance without a light?
Q. I don't know how they go to dances. You could feel how to dance?
A. I don't want any feeling in mine when I got to a dance.
Q. You were not dancing?
A. No, sir.
Q. What were you there for?
A. I was there prompting.
Q. You called the dance?
A. Yes, sir.
Q. What were they dancing?
A. A quadrille.
Q. You were not waltzing?
A. No, sir.
Q. You were calling the dance when all of this thing happened, were you?
A. No, sir; I was n't calling when this thing happened, Vann was calling. I had been calling and I got tired, and I got him to call.
Q. What was Frank doing before he got the pistol?
A. He was dancing.
35 Q. Who told Frank that this man was whipping his brother?
A. I don't know.
Q. Did you hear anybody tell him?
A. No, sir.
Q. I suppose he was where he could see it, was he not?
A. I suppose he was.
Q. You don't know where Frank went to?
A. No, sir.
Q. You were not intoxicated were you?
A. No, sir.
Q. But Randall was?
A. Yes, sir.
Q. And he was the only drunk man there?
A. No, sir; Nick Thornton was drunk, too.
Q. He and Nick were the fellows that were drunk?
A. Yes, sir.
Q. Is it fashionable to swear around dances up there?
A. Yes, sir; around there it is. That is nothing strange.
Q. Don't you have any schools up in that country?
A. Yes, sir; lots of them.
Q. Any churches?
A. Yes, sir.
Q. They do not teach that sort of doctrine up there—that people ought not to curse?
A. No, sir.
Q. You say they always curse at dances up there?

A. Of course.
Q. The ones that get drunk do the cursing?
A. They curse sometimes when they are not drunk at dances.
Q. Randall was drinking and cursing?
A. Yes, sir; he was cursing.
Q. He was cursing around in the house, mad?
A. No, sir; he wasn't mad that I know of.
Q. Did he seem to be out of humor?
A. No, sir; he always cursed when he was drinking around that way.
Q. He wasn't trying to have any fuss with anybody, any difficulty?
A. No, sir.
Q. Wasn't cursing at anybody?
A. No, sir.

36 Q. Did he curse at the boy?
A. I don't knew whether he did or not.
Q. Did he not curse at him when he told him that he wanted his pay?
A. I don't know whether he did or not.
Q. When the little boy went around to him and told him that he wanted his pay, and Tom Dillwood told him that he would get it, didn't Randall curse at the boy then?
A. I don't know whether he did or not.

37 DAVE RIDER, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Dave Rider.
Q. Do you know this defendant?
A. Yes, sir.
Q. Did you know Randall Lovely in his lifetime?
A. Yes, sir.
Q. Were you present at the time that he was killed?
A. Yes, sir.
Q. State what you saw.
A. I only saw him shoot the second shot; the first shot that was fired I didn't see that.
Q. Did you hear it?
A. Yes, sir; and I saw the fire from the pistol when he fired it.
Q. Did you see or hear anything transpire before that, any trouble between Randall and the boy?
A. No, sir.
Q. Where were you when he shot the second shot?
A. I was setting near the far end of the hall, about 35 feet from them.
Q. What did you observe; what did you see?
A. Well, after he fired the shot I set there, I guess, a couple of minutes before I got up to go where they were; there was nobody se'med to be disturbed in any way over it, and I thought I would go up there; and some of the other boys walked up, and I said, "Who is this doing all this shooting up here?" and this gentleman here, the defendant, Buster—his name was Collins, but we called him Buster—he turned and walked away from the table with the pistol in his hand, and he said, "I almost killed

him, and I may as well finish him," and he turned around and punched the pistol down at his head, and fired again, and then walked on out of the house.

38 Q. That is the way it occurred, the second shot?

A. Yes, sir; that is all I saw.

Q. Did he say anything after he fired the second shot?

A. No, sir.

Q. If I understand you, after the first shot was fired you went up to where Randall Lovely was?

A. Yes, sir.

Q. Where did you find him?

A. He was standing up behind the table, between the table and the wall.

Q. Standing, or had he sank down?

A. He was standing up.

Q. What condition was he in?

A. He was just standing up, like any other man, only he was kind of moving a little bit.

Q. Standing straight up against the wall or leaning against the wal'.

A. Leaning against the wall.

Q. Saying anything?

A. No, sir; I never heard him speak.

Q. Did you hear where he was shot?

A. Yes, sir.

Q. How was he when the defendant fired the second shot?

A. He had then fallen down; he had slid down.

Q. How long was it before he sank?

A. I guess it was about 2 or 3 minutes.

Q. Then he sank down?

A. Yes, sir.

Q. You asked how this happened?

A. I don't know whether it was me or someone else, and he said it was him.

Q. He hae slid down, and the defendant said it was him, and that he would finish him?

A. Yes, sir.

Q. Where was the pistol pointed when he fired the second shot?

A. It was pointed down at his head.

Q. Where did it strike it?

A. It struck his hat, and I said it went down under his face;

39 and the other' said it went on the back part of his head. I think it went down under his face. If it had went on the back side it would have been bound to have gone down in his shoulder, I think.

Q. Your opinion is it went down the other way?

A. Yes, sir.

Q. Was his back or face to the wall?

A. His back was to the wall.

Q. You say you examined the body afterwards?

A. Yes, sir.

Q. Where did you find it shot?

A. Right down through the neck, at the lower part of the neck.

Q. It went through there did it?
A. Yes, sir; clear through.
Q. Did Randall say anything after he was shot?
A. I never heard him say a word.
Q. Did the defendant say anything else besides it was him, and he would finish him?
A. No, sir; never said anything else.
Q. Did you know the defendant before that?
A. Yes, sir.
Q. Please state if he left the country?
A. I never saw him until last February.
Q. You never saw him until after he was arrested?
A. No, sir.
Q. Did he have a wife?
A. Yes, sir.
Q. Did she remain in Fort Gibson?
A. Yes, sir; I think so.

Cross-examination by Mr. C. J. FREDERICK:

Q. You did not see the first shot?
A. No, sir.
Q. You did not see Lovely whipping the little boy?
A. No, sir.
Q. You did not see him buy a bottle of pop and refuse to pay for it?
A. No, sir.
Q. Were you there when Randall came in the house?
A. Yes, sir.
Q. Who came with him?
A. I think it was Nick Thornton, Henry Nave, and Robbert Ross.
Q. Was he drunk?
A. He appeared to be drinking.
Q. Was he cursing around there?
A. No, sir; not that I heard.
Q. You did not hear him curse then?
A. No, sir.
Q. Did you hear him talk any at all?
A. Yes, sir; he talked considerable.
Q. Who did he talk with, you?
A. No, sir; he did not talk with me any.
Q. What were you doing around there?
A. I was just setting around there in the house.
Q. Dancing?
A. No, sir.
Q. Did Lovely dance any?
A. I don't believe he did.
Q. What did he do after he came in?
A. He didn't do anything; only came in and talked around there with the boys, and set around.
Q. Did he drink any after he came in?
A. I never saw him drink any.
Q. You didn't hear him curse any?

A. No, sir.

Q. In fact, there was so many in the house, and they were all noisy, and you could not tell who was talking. What was Frank Collins doing?

A. He was dancing; and when Randall first came in Buster started out, and they started out after him.

Q. By Buster you mean this defendant?

A. Yes, sir; he said he was going home, and pretty soon he came back and staid around there.

Q. Did his wife come back with him?

A. Yes, sir.

Q. His wife started off with him?

A. Yes, sir.

Q. Who else started off with him?

A. No one else at all.

Q. They started off after Randall came?

A. Yes, sir.

Q. Afterwards they came back?

A. Yes, sir.

Q. How come them to come back?

A. I don't know.

41 Q. You do not know about that?

A. No, sir.

Q. Don't you know that he started off with his wife because Randall came there drunk and cursing?

A. I don't know that he did.

Q. You did not hear any cursing there at all?

A. All of the rest of them was cursing, but I didn't hear Randall.

Q. Everybody else was cursing but Randall?

A. I think they were. If he cursed I don't remember it.

Q. Randall was a very pious man?

A. Yes, sir.

Q. He never cursed or used bad words. He was the only one that did not do that around there. All the rest of the people cursed, didn't they?

A. I don't know; they were all about alike, I guess.

Q. All about alike except Randall?

A. Yes, sir.

Q. Do you mean to tell us that Randall did not curse?

A. If he did I didn't hear it. That is what I meant to tell you.

Q. Were you close enough to have heard him?

A. No, sir; I wasn't.

Q. That is the reason that you did not hear him if he cursed, you were not close enough?

A. That is it exactly; they were all back from me in the corner where I was setting.

Redirect-examination:

The DISTRICT ATTORNEY. Are you a Cherokee?

A. Yes, sir.

42 JONAS THOMPSON, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Fort Gibson.
Q. Do you know this defendant, Frank Collins?
A. Yes, sir.
Q. Did you know Randall Lovely in his lifetime?
A. Yes, sir.
Q. Were you at the place where he was killed?
A. Yes, sir.
Q. Did you see the defendant?
A. Yes, sir.
Q. Did you see the shooting?
A. Yes, sir.
Q. How was it done?
A. They had a dance, and Frank's brother was clerking, and Randall Lovely went up and got a bottle of soda pop from him——
Q. You saw him get it did you?
A. Yes, sir. And he did not pay him for it, and he came back at the stand, and he told him that he wanted him to pay for the soda pop, and he told him that he would not do it, he would pay him when he got ready, and he asked the boy if he did not like it, and the boy said that he didn't like it, and wanted his pay, and Randall cursed him, and he slapped at him, and didn't hit him, and the boy dodged, and he walked around behind the table, and slapped him twice, and by that time Frank got the pistol, and shot him.
Q. Was he behind the table when he was shot?
A. Right at the end of the table when he was shot.
Q. Where was the window?
A. Right behind the boy.
Q. Did you see Frank get his pistol?
A. Yes, sir.
43 Q. Where did he get it?
A. He got it out of another fellow's pocket.
Q. Who was the other fellow?
A. I never paid any attention; they said it was Frank Hudson.
Q. You saw him take it from another fellow's pocket?
A. Yes, sir.
Q. What did he do when he took it?
A. He took it and he run and shot him.
Q. Did he say anything to Randall?
A. No, sir; I never heard him say a word until after he shot.
Q. What did he say then?
A. He said, "I will learn you how to be trying to cut up my little brother with a knife."
Q. Did he say anything else?
A. That is all he said.
Q. Did he do anything else?
A. No more than make the second shot.
Q. How did he make that?
A. That is all I noticed; he walked off after he made the first shot, and walked back and made the second shot.
Q. Did he say anything else?

A. I never heard him say anything.
Q. How did he make the second shot?
A. He walked back and shot again.
Q. How close did he go to him when he shot the second shot?
A. About 6 feet.
Q. Did he reach over?
A. Yes, sir; right down that way.
Q. Did he say anything when he shot that shot?
A. I never heard him say anything.
Q. What was Randall doing then?
A. He was down beside the house; squatted down right beside the house.
Q. Did he have any arms?
A. No, sir.
44 Q. No weapons?
A. No, sir.
Q. Was he talking?
A. No, sir. I never heard him say but one word; he said to Mr. Steadman to help him up just a little.
Q. Was that before he was shot the second time?
A. Yes, sir.
Q. He was squatted down there; wasn't doing anything, or was not saying anything, and did not have any weapons when he was shot by the defendant the second time?
A. Yes, sir.
Q. Where did he shoot him the second time?
A. I never saw the second shot fired.
Q. You did not see him shoot the second shot?
A. I saw him shoot it, but I didn't see where it hit him.
Q. Did you see what direction that he pointed the pistol?
A. Yes, sir; right down that way; I saw a hole through the rim of his hat. Henry Nave and Ed. Ross and me was the ones that took him out from under the table.
Q. Was he under the table?
A. Yes, sir; right in behind the table.
Q. You say he made the second shot; pointed the pistol towards his head?
A. Yes, sir.
Q. Was Randall dead at that time?
A. He draw'd one breath after we drawed him out from under the table.
Q. How do you know he was not dead?
A. He drawed a breath after we drawed him out.
Q. Was he gapping at the time that he was shot?
A. Yes, sir; he gaped after that. After we pulled him out from under the table he made one long breath, and then he was dead.
Q. You say you saw a hole in the hat?
A. Yes, sir.
Q. The defendant said, "I will show you how to cut my brother?"
A. Yes, sir.
Q. Did Randall cut at his brother?

A. No, sir.
45 Q. Had no knife?
A. No, sir.
Q. Did you hear the defendant say anything about finishing him?
A. No, sir.
Q. You say that he drew one breath after you got him out from under the table?
A. Yes, sir.
Q. Did he fall under the table before or after the second shot was fired?
A. He was plumb down when the second shot was fired.

Cross-examination by Mr. C. J. FREDERICK:

Q. Were you there when Randall came that night?
A. Yes, sir.
Q. He came there drunk, did he not?
A. Yes, sir; he appeared to be drunk.
Q. Was he cursing?
A. Yes, sir.
Q. Did he try to raise a fuss with somebody?
A. He had been in a little fuss just a little before that.
Q. Who had he been fussing with?
A. John Vann.
Q. Was he cursing him?
A. Yes, sir.
Q. Was that before or after he got the soda pop?
A. That was before.
Q. Who stopped that fuss, or how come that fuss to stop, or did it stop at all?
A. It stopped; I don't know how it come to stop; I didn't pay much attention to it.
Q. You just simply heard him cursing around, I reckon?
A. Yes, sir.
Q. You say that you saw him go and get the soda pop from the boy?
A. Yes, sir.
46 Q. Who went with him to get it?
A. I never saw any one wit' him.
Q. He went by himself, then?
A. Yes, sir.
Q. Would not pay the boy for his pop?
A. No, sir.
Q. What did the boy say to him?
A. The boy told him that he wanted pay for it.
Q. What did he say?
A. He said he would not pay him until he got ready.
Q. Did he curse any?
A. Yes, sir; he told the boy that he would not pay until he got ready, and asked him if he did not like it, and the boy told him no, that he didn't like it, and he slapped at the boy, and told him that he would slap the devil out of him.
Q. He slapped at him that time?

A. Yes, sir; he slapped at him across the tab'e and the boy dodged back that way, and he never hit him; and then he walked around behind the table.

Q. What did he say to the boy when he walked around behind the table?

A. He didn't say anything to him more than hit him.

Q. How many times did he hit him?

A. I saw him hit him twice.

Q. Where did he hit him?

A. On the jaw.

Q. Did he say anything then?

A. No, sir.

Q. Did he curse then?

A. I never heard him curse.

Q. He ran around and slapped the boy on the jaw?

A. Yes, sir.

Q. With his fist?

A. With his hand.

Q. Did you see him have a fork in his hand?

A. No, sir.

Q. Or just before then?

A. No, sir.

Q. Wasn't there a fork laying there on the table?

A. If there was I didn't notice it; I never did pay any attention to it.

Q. Did you hear him curse Frank there that night?

A. No, sir.

47 Q. You call Frank, the defendant, Buster?

A. Yes, sir.

Q. Did you hear him curse Buster?

A. No, sir.

Q. He came there cursing when he first come?

A. Yes, sir.

Q. He had a fuss with Vann?

A. Yes, sir.

Q. That was in the house, was it?

A. Yes, sir.

Q. How long had he been there before he got shot?

A. He had been there from along about midnight until about 2:00 o'clock at night, I suppose, when he got shot.

Q. Were you there when Frank and his wife started to leave, went off?

A. Yes, sir.

Q. What time was that?

A. That was along about 12 o'clock, I guess.

Q. What did they start to leave for?

A. I don't know; they just got tired, I suppose; got tired of the dance, and got sleepy, and concluded they would go home.

Q. Didn't Frank start to leave because this man Randall had raised a fuss there, and was cursing around in there?

A. Not that I knows of.

Q. How come them to come back?

A. I don't know how come them to come back.

Q. How long were they gone?
A. Not very long.
Q. Who else left?
A. No one that I know of.
Q. Just those two?
A. Yes, sir.
Q. You did not leave?
A. No, sir.
Q. What were you doing?
A. I was dancing.
Q. Was anybody else cursing but Randall?
A. I could not tell you about that. In a place like that mighty near all the people curse.

48 Q. They were not all mad, were they?
A. I wasn't mad.

Q. You didn't curse?
A. I could not say that I did.
Q. You do not curse only when you get mad?
A. I curse sometimes in fun.
Q. You do not use the same kind of cursing when you are mad as you do when you are in fun?
A. No, sir.
Q. What kind of cursing was this man Randall doing—mad or in fun?
A. I can not tell the different hardly.
Q. He wasn't funny when he was cursing Vann?
A. No. sir; he didn't look to be funny then.
Q. Did they fight?
A. No, sir.
Q. Who kept them from fighting?
A. I don't know who kept them from it; I think that Mr. Steadman came and took Randall off and talked to him, and he went off then.
Q. Was he raising a fuss with any one else?
A. Not that I noticed.
Q. People were afraid of him, were they not?
A. I suppose some of them were; I don't know.
Q. Why didn't you stop him from slapping that boy?
A. I did not think I had any right to do it.
Q. Did you think it was right for a man to whip a boy—to slap a boy that way?
A. No, sir.
Q. Did you tell him to stop?
A. I didn't have time to tell him to stop in the length of time that he got shot; I had just saw them at a little time before he got shot.
Q. You saw him slapping at the boy; you did not have time to tell him to stop shooting before he shot him?
A. I was just standing there looking at him.

49 Q. Was he slapping at the boy when Frank shot him?
A. No, sir; he wasn't slapping at him when he shot him.

Q. He had just done it?
A. Yes, sir.
Q. Was he trying to get to him from there?

A. No, sir; standing looking back at the boy.
Q. Had the boy got out of his way?
A. The boy was just like he was standing this way [indicating].
Q. Wasn't Randall trying to get around to him?
A. He had been there slapping him, and stood that far back.
Q. What was he saying to the boy?
A. I never heard him say anything to him.
Q. He did not have time to say much until Frank shot him?
A. No, sir; didn't have time to say very much.
Q. Didn't have time to say very much after he slapped the boy until Frank shot him, did he?
A. No, sir.
Q. He reached over and slapped at the boy, and then got around between the table and the wall and reached around and slapped the boy, and didn't Frank shoot him just then?
A. He shot him a little while after that.
Q. He didn't have time to get out of the way, did he? When he saw him slapping his brother he run and got the pistol, and it wasn't an instant until he shot him, was it? When he got the pistol this Randall was slapping the boy?
A. No, sir; he had done quit slapping him.
Q. What was Randall doing when he shot him?
A. He was looking at the boy, talking to him.
Q. Was he not trying to get in between the wall and the table there to get at the boy?
50 A. He was already in between the wall and the table.
Q. Was he not trying to get around further; wasn't that the place he was shot at?
A. Yes, sir; he shot him when he was in between the wall and the table, but he had stepped around that far like he had started out from the boy.
Q. Are you sure of that?
A. Yes, sir.
Q. Like he had started out from the boy?
A. Yes, sir.
Q. How far did he step back?
A. He came around from behind where the boy was there to the end of the table.
Q. Where did he have his hands?
A. One hand on the table.
Q. Had it doubled up?
A. Yes, sir.
Q. Towards the boy?
A. I don't know whether it was towards the boy or not, but he had one hand on the table.
Q. Was his left hand or right hand on the table?
A. I never paid any attention.
Q. Which side was he shot on?
A. On his right side.
Q. He had his right side to Frank when he was shot?
A. Yes, sir.

Q. Had his face to the little boy?
A. Yes, sir.
Q. He had one hand on the table?
A. Yes, sir
Q. How did he have the other one?
A. I don't know; just had it up.
Q. Was looking at the little boy?
A. Yes, sir.
Q. Had just slapped the boy?
A. Yes, sir.
Q. How old a man was Randall?
A. I don't know.
Q. Was he an old man or a young man?
A. I guess he was about something like 30 years old.
Q. A man of a family, was he not?
A. Had a wife and a family.
51 A. Yes, sir.
Q. You don't know from whose pocket the defendant got the pistol?
A. No, sir; I never paid any attention to it.
Q. You did not hear Frank, the defendant, say, "I will finish him?"
A. No, sir.
Q. You say Steadman helped Randall up?
A. No, sir; he didn't put his hand on Randall.
Q. Did he ask him to help him up?
A. Yes, sir.
Q. Did he not say to Steadman to catch him?
A. I heard him say to Steadman to help him just a little bit up.
Q. Did Randall dance any that night?
A. Yes, sir.
Q. How many sets did he dance?
A. I don't know how many. I know that he danced one set.
Q. Who did he dance with?
A. He danced with some woman; I did not pay any attention to who it was.
Q. He didn't dance with you?
A. No, sir. He did dance in the same set I did, though.
Q. Was he not too drunk to dance well?
A. I don't know.
Q. He did not get there until about midnight, did he?
A. Yes, sir; he got there before midnight.
Q. It wasn't long before midnight, was it?
A. I suppose it was a good little while.
Q. Had he been there more than half an hour when he was shot?
A. Yes, sir; he had been there longer than that. He had been there and been off again and come back.
Q. Did he have a fuss with Vann and go off and come back?
A. No, sir.
Q. He had a fuss with Vann after he had been off and came back.
52 A. Yes, sir.

Q. Did he dance after having a fiss with Vann?

A. I don't remember whether it was before he had the fuss with Vann that he danced or afterwards.

Q. He wasn't in very good humor after having the fuss with Vann, was he?

A. I don't know whether he was or not; him and Vann had made it all right; they had made their little fuss all right. I don't know whether he got mad any more or not.

Q. Was he not bulldozing the darkies that were there that night; was he not cursing around and trying to run over them?

A. I never saw him try to run over anybody much, only that him and Van got into it.

Q. He did not try to run over you?

A. No, sir.

Q. Was he any akin to you?

A. No, sir.

Q. Are any of these people here any akin to him?

A. Not that I know of.

Q. Is Ross any akin to him?

A. Not that I know of.

Q. Steadman?

A. No, sir; not that I know of.

Q. Is John Vann any akin to him?

A. Not that I know of. He may be; I don't know.

Q. He is the one that had this fuss with him?

A. Yes, sir.

Q. Is Vann a grown man?

A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

How *nig* a man was Randall?

A. He was a small like, such as a man like Henry Nave.

Q. Was he as big as the defendant?

A. He was larger than him; he was heavier than him.

53 Q. When he slapped the boy did he knock him down?

A. No, sir.

Q. Did the boy cry?

A. Yes, sir.

Q. Just struck him with his open hand?

A. Yes, sir.

Q. Who owned that house?

A. I don't know who owned it.

Q. Dillwood?

A. I don't know who owned the house.

Q. Who owned the table and pop?

A. I don't know who owned that.

Recross-examination:

Mr. FREDERICK. You say that he made the boy cry?

A. The boy was crying beforehand, was crying because he would not pay him in the first place.

Q. The boy was crying when Frank shot at him, was he?

A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. The boy was crying because he could not get the pay before he slapped at him?

A. Yes, sir.

Q. He didn't 'nock the boy down?

A. No, sir.

Q. You say about the time that he struck him the last time that he stepped back, and then the defendant run and got his pistol, and after that Randall didn't strike the boy any more?

A. No, sir.

Q. He went how far to get his pistol?

A. About as far as from here to where the defendant is now—about 20 feet.

Q. Got his pistol and then came back?

A. Yes, sir.

Q. During that time Randall did not strike the boy after the defendant was after the pistol?

A. No, sir.

Q. Did he strike the boy at any time while the defendant had the pistol in his hand?

A. No, sir.

Mr. FREDERICK. How do you know that he didn't?

A. I didn't see him strike him.

54 JOHN VANN, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is John Vann?

Answer. Yes, sir.

Q. Where do you live?

A. At Fort Gibson.

Q. Do you know the defendant?

A. Yes, sir.

Q. Did you know Randall Lovely?

A. Yes, sir.

Q. Were you present at the time that he was killed?

A. Yes, sir.

Q. Who killed him?

A. Collins.

Q. How did he kill him?

A. Shot him.

Q. Go on and tell about it, the way it took place.

A. The way it took place Randall was slapping his little brother about a bottle of soda pop; he got the pop and the boy asked him to pay for it, and he said he would not do it; and finally he kept on after him to pay him, and finally the boy cussed him, and then Randall slapped him and started around the corner of the table, to slap him again, I suppose, and by that time Collins shot him.

Q. What did the little boy say to him when he cussed him?

A. He says, "You son of a bitch you have to pay me."

Q. Did you see where the defendant got his pistol?

A. No, sir; I didn't see where he got it.
Q. When he shot Randall what did Randall do?
A. He fell.
Q. Go on and tell all about it; what happened after that?
A. After he shot him he fell right down between the wall of the house and the table, right down kind of on his knees like, and Collins
55 he stepped off 4 or 5 steps, and he said, "I have shot him down and by God I may as well finish him." And he steps up again, and he fired the next shot, and that ball went through the rim of his hat.
Q. Then what did Collins do?
A. He walked out.
Q. Did you see him any more?
A. No, sir; not until after he was arrested.
Q. He shot the first time and stepped off and came back; what did he say then?
A. "By God, I may as well finish him."
Q. That was when he shot the second time?
A. Yes, sir.
Q. Shot through the hat, I believe you say?
A. Yes, sir.
Q. Where did he shoot him the first time?
A. Shot him in the neck.
Q. High or low in the neck?
A. I don't remember now how high it was; I can not tell exactly, but it was on the neck.
Q. Do you know whether the ball went clear through the neck?
A. No, sir.
Q. After Collins shot Randall you say that he walked out of the house?
A. Yes, sir.
Q. Did you see anything more of him after that?
A. No, sir; I never saw him until after he was arrested.
Q. Did he have his pistol with him?
A. I suppose he did; he went out of the house with it.
Q. He lived at Fort Gibson, did he not?
A. Yes, sir.
Q. You never saw any more of him after that?
A. No, sir.
Q. How many times did Randall slap the boy?
A. He slapped him once to my knowing.
Q. Did he knock the boy down?
A. No, sir.
Q. Did he slap him before the boy called him a son of a bitch?
A. No, sir.

56 Cross-examination by Mr. C. J. FREDERICK:

Q. Was you any kin to Randall?
A. No, sir.
Q. Are you the one that Randall had the fuss there with that night?
A. I don't know exactly as we had a fuss.
Q. And that is the only answer you are going to give to me?
A. I told you what you asked me.

Q. You did not exactly have a fuss?
A. No, sir; I didn't have no fuss.
Q. Didn't have any at all?
A. We didn't have any fuss big enough to fight over.
Q. Did you have any dispute, then?
A. Oh, yes; we had a little dispute.
Q. Randall was drunk, was he not?
A. Yes, sir; he was drinking.
Q. That is the reason that he had the fuss with you, is it not?
A. I don't know whether that was the reason or not.
Q. Was he cursing around there?
A. He didn't seem to curse me only a time or two.
Q. He did curse you a time or two?
A. Yes, sir.
Q. Did you curse him too?
A. No, sir.
Q. Did you hear him curse anybody after that?
A. I don't remember whether he cursed anybody after that or not.
Q. Did you hear him curse anobody but you that night?
A. I don't remember of hearing it; I may have heard it and forgotten it.
Q. Did you hear him curse the boy that he slapped?
A. No, sir.
Q. Did you hear him say anything to the boy at all?
A. I heard him say that he would not pay him for his pop.
57 Q. You heard the boy curse him?
A. Yes, sir.
Q. What did he say to him?
A. He said "You son of a bitch, you will have to pay me."
Q. You did not hear him curse the defendant; did he curse him?
A. I don't remember whether he did or not; I didn't hear him.
Q. You saw him slap the boy, though?
A. Yes, sir.
Q. You saw him slap the boy, and about that time Collins shot him?
A. Yes, sir.
Q. That is right, is it?
A. Yes, sir.
Q. How many times did he slap him?
A. Once that I seen.
Q. You saw him slap at him before he slapped him, didn't you; reached over the table and slapped at him?
A. No, sir.
Q. You did not see him reach over the table?
A. Not before he slapped him.
Q. You saw him reach over the table and slap him, didn't you?
A. He slapped him, and started around the corner of the table to slap him again, I suppose.
Q. He started around and slapped him again, did he not?
A. No, sir; he only slapped him once that I saw.
Q. You are sure that he only slapped him once?
A. That is all that I seen.

Q. Did he not go around and slap him twice after he got around?
A. No, sir; not that I seen; if he did, I didn't see it.
Q. That is the most you looked to see about it?
A. Yes, sir.
Q. Do you know whether Collins and Randall were friendly before then or not?
A. They appeared to be friendly, to me.
Q. Do you know of their having any difficulty?
A. No, sir.
Q. How long had he been there before he was shot?
A. I do not know; I suppose it was between 10 or 11 o'clock
58 when I went there myself.
Q. He came after you got there?
A. No, sir; he wasn't at the dance when I got there, but he was in town off on a serenade; him and some other boys.
Q. After he came back from the serenade to the dance, how long was it until he was shot?
A. I could not tell you how long it was.
Q. Fifteen minutes?
A. Probably it might have been longer than that.
Q. When was it you had the row with him, the fuss; was it when he came back from the serenade?
A. Yes, sir.
Q. How long after you and he had the fuss before he went up and bought a bottle of pop from the boy?
A. It had been a good bit.
Q. Ten minutes?
A. It was longer than that; it was something near half an hour, I suppose.

59 HENRY NAVE, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. Your name is Henry Nave?
Answer. Yes, sir.
Q. Where do you live?
A. Fort Gibson is home.
Q. Do you know Frank Collins, the defendant?
A. Yes, sir.
Q. Did you know Randall Lively in his life time?
A. Yes, sir.
Q. Were you at the party the night that he was killed?
A. Yes, sir.
Q. How did it occur?
A. I was in the set dancing; I didn't hear any of the disturbance at all; I just only seen the shot.
Q. Go on and tell about that?
A. I seen when Frank shot Randall, Randall sank down.
Q. How far was he from Randall when he shot him?
A. I could not tell you from the distance I was; there was a good many people betwixt I and him, and he sank down, and I saw the second shot then.

Q. Go on and tell all about that now?
A. After he shot him the first shot——
Q. What did he say after he shot the first shot?
A. I could not tell what he said; I was too far off to hear anything. I just seen the shot was all.
Q. You saw him shoot the second shot?
A. Yes, sir.
Q. Where was Randall when he shot him the second shot.
A. When I went up there he was right down near the end of the
60 table like he had started around.
Q. Was he standing or falling?
A. He was squatted right down.
Q. Was that before the second shot was fired?
A. Yes, sir; he squatted down before the second shot was fired.
Q. Did you go up to him before the second shot was fired.
A. No, sir; I didn't go there until after that.
Q. Did you hear the defendant say anything?
A. No, sir.
Q. After he shot him the second time what became of him?
A. He went out the last account I saw of him. He went out of the house.
Q. Did you ever see him any more?
A. No, sir; not until he was arrested.
Q. He lived at Ft. Gibson?
A. Yes, sir.
Q. Did you examine the man that was shot?
A. I didn't examine the shots any.
Q. Did you see where he was shot?
A. Yes, sir; he was shot in the neck.
Q. Anywhere else?
A. There was one shot went through the hat, but I didn't examine closely to see whether that hit him anywhere else, only I seen a little blood on the back of his neck here, and they said that was where it grazed him; I didn't look very closely at the shoots.
Q. Is that all you know about it?
A. Yes, sir.

Cross-examination waived.

61 FRANK HUDSON, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. What is your name?
Answer. Frank Hudson.
Q. Where do you live?
A. Fort Gibson.
Q. Do you know the defendant?
A. Yes, sir.
Q. Did you know Randall Lovely in his life time?
A. Yes, sir.

Q. Were you at the dance on the night that he was shot in Fort Gibson?

A. Yes, sir; I was there.

Q. What time did you go to the dance?

A. I guess it was about 8:00 o'clock.

Q. Did you have any pistol?

A. Yes, sir; I had his.

Q. Did you have his when you went there?

A. No, sir.

Q. Did you go with him to the dance?

A. No, sir.

Q. When did you get his pistol?

A. He got in the set to dance and he told me to hold his pistol until he danced that set.

Q. How long was that before the shooting?

A. I do not know; that was about 15 minutes, I guess, or along there.

Q. He handed you the pistol and told you to hold it?

A. Yes, sir.

Q. What did you do with it?

A. I didn't put my hands on it; he put it down on the inside of my pocket, and when they commenced dancing I laid down and went to sleep, and in about 15 minutes afterwards, I guess, I felt my coat to go back that way, and when I raised up he had done shot.

62 Q. Shot the first shot?

A. Yes, sir.

Q. Did you see him shoot the second shot?

A. Yes, sir; I just saw him shoot the second shot. I never heard him say anything at all.

Q. How did he fire the second shot?

A. I don't know; I never saw him; I wasn't paying any attention to it. I was excited when I woke up.

Q. You can not tell whether he fired it down or up towards the heavens?

A. He could not have fired up, because the man was falling down. He shot down, I guess.

Q. Then you are the man he got the pistol from?

A. Yes, sir.

Q. It was his own pistol?

A. Yes, sir.

Q. What kind of a pistol was it?

A. I don't know sir; I never paid any attention to it.

Q. You saw that Randall was dead; didn't you, afterwards?

A. I don't know whether he was dead or not; I came right on out.

Q. He is still alive; is he?

A. I don't know; I didn't go to him at all.

Cross-examination. By Mr. FREDERICK:

Q. You did not see him fire at all did you?

A. I saw him fire the second shot.

Q. You don't know who he fired at or anything about it, or whether he shot at anybody or not?

A. No, sir; I didn't notice.

63 Government rests.

64 The defendant, to maintain the issues on his part, introduced the following-named witnesses: Walter Shannon, Tom Dilwood, J. E. Dawn, Aleck Kemp, Emanuel Vann, Frank Collins (defendant), who testified as follows, to wit:

65 *Testimony offered by defense.*

WALTER SHANNON, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Walter Shannon.
Q. How old are you?
A. 12, growing on 13.
Q. Are you any akin to Frank, here?
A. Yes, sir; I am a brother.
Q. Are you a full brother or a half brother?
A. I am a half brother.
Q. You have got the same mother?
A. Yes, sir.
Q. Were you at the dance that night at the time that Frank shot this fellow, Randall Lovely?
A. Yes, sir.
Q. Tell us how it happened. What were you doing?
A. At the dance I was keeping a stand.
Q. What sort of a stand, Walter?
A. It had things there for the folks, the women, when they got through dancing.
Q. What did you have for sale?
A. Had candy, chicken, soda pop.
Q. Did you have bread?
A. Yes, sir.
Q. You were clerking there?
A. Yes, sir.
Q. Who were you clerking for?
A. Tom Dillwood.
Q. Is Tom Dillwood here?
A. Yes, sir.
Q. Was he helping you too?
A. Yes, sir; he was helping me before then, but at the time of the shooting I don't know where he had been.
Q. Tell us about Randall.

66 A. I was behind the table when he came in, and he come up and called for some soda pop, and I let him have a bottle, and he drank that and called for another and I let him have that and he started off, and I asked him for the pay.

Q. Had he paid you for either bottle?
A. No, sir.
Q. You say that he came up and called for a bottle, and you let him have that and he called for another bottle?

A. Yes, sir.
Q. Then you asked him for the pay?
A. Yes, sir.
Q. How much was the pya?
A. 20 cents.
Q. A dime a bottle?
A. Yes, sir.
Q. What did he say to you?
A. He came back then and went to hitting on me, pounding on me across the table. He said if I hadn't asked him for it he would have paid me. He said I was dunning him, and he commenced hitting on me.
Q. What did he say to you when he was hitting on you?
A. He told me that he would slap the devil out of me, and cursed me, and hit me in the face.
Q. What did he say?
A. He said, "God damn you, I will slap the devil out of you."
Q. And hit you in the face?
A. Yes, sir.
Q. Where were you standing?
A. I was standing behind the table.
Q. Where was he?
A. He was standing on this side of the table.
Q. At the end of the table?
A. Yes, sir; he just kept coming around the table.
Q. What did you do?
A. I didn't do anything; tried to jump out, tried to get out of the window then.
Q. How many times did he hit you?
A. I don't know, sir; three or four times.
Q. What did you do?
A. Standing there crying.
67 Q. What were you crying about?
A. Because he was hitting me.
Q. Did he have any weapons in his hands, or anything in his hands besides his hands?
A. No, sir; I didn't see anything at the time that he was hitting me.
Q. Did you see anything after he hit you?
A. No, sir.
Q. Did you see anything before he hit you?
A. Yes, sir; I had a fork laying on the table, and he picked it up before he hit me.
Q. What did you have the fork for?
A. Had the fork to take out chicken with.
Q. What was Randall doing when Frank shot him?
A. Hitting at me, coming around at the end of the table.
Q. You were crying?
A. Yes, sir.
Q. Were you saying anything?
A. No, sir.
Q. What was he saying?

A. He just come around, he said he would slap the devil out of me, and just came on right on around.

Q. How long had Randall been there at the dance?

A. I guess he had been there ever since the dance come up; I don't know.

Q. Do you know whether or not he had had a fuss with somebody else?

A. Yes, sir; he had a few words with a fellow named John Vann.

Q. How long was that before he slapped you?

A. About half an hour, I guess.

Q. What did you say to him that made him slap you?

A. I told him to pay me. After he got the soda pop he came back and said, "I was going to pay you if you had not asked me for it, and now I won't pay you nothing." I told him that he ought not to do me that way.

Q. What did he say?

A. He did not say anything.

68 Q. Go ahead.

A. And he slapped me, and told me God damn me, he would slap the devil out of me.

Q. Then what occurred?

A. He come back and I tried to get to the window, and he followed after me, tried to hit me, and Frank shot him.

Q. You are 12 now, growing on 13?

A. Yes, sir.

Q. That was last July was a year ago, was it?

A. Yes, sir; I do not know exactly; I suppose it was, though.

Q. Do you know whether or not he and Frank were friendly before then?

A. No, sir; I don't know.

Q. Had he ever whipped you before?

A. No, sir. He was quarreling at me one night before, but then he never hit me before. One night at a dance before then.

Q. What were you doing at the dance before then?

A. Nothing.

Q. You were not clerking the other night?

A. No, sir.

Q. What made him quarrel at you then?

A. I was setting on the table, and he got up with his old pistol in his hand, and he was holding it right in the light of the candle, turned right towards me, and I told him not to do that, and he said he did not care.

Q. Is that what he said?

A. Yes, sir.

Q. Did you see him there with a pistol the night he was shot?

A. No, sir.

Q. Did you say that he had a fuss with somebody else that night?

A. He did, before he commenced slapping me.

The DISTRICT ATTORNEY. A few words, he said.

Mr. FREDERICK (of counsel for defense). What was he saying to the fellow?

A. I don't know what they started to fuss about; I don't know how it came up. He said something to the fellow and the fellow said
69 something back to him, and the fellow told him that he could not run no sandy on him, and he told him if he fooled with him he would show him whether he could not run no sandy, and he said he didn't run no sandy, he meant what he said, that he would fight him.

Q. Did anybody try to keep him from whipping you?
A. No, sir.
Q. Nobody tried to keep him off of you?
A. No, sir.
Q. Where was Mr. Dillwood then?
A. I don't know where he was.
Q. He was not there where you was, was he?
A. No, sir.
Q. Did you cry loud, or how was you crying?
A. I didn't cry much loud.
Q. Did you tell him not to hit you?
A. No, sir; I was just dodging him; I was trying to get out of the way.

Cross-examination by the DISTRICT ATTORNEY:

Q. Why didn't you get out of the window?
A. I could not get out of the window.
Q. Why?
A. Because I could not.
Q. The window was up, was it not?
A. Yes, sir.
Q. Why couldn't you get out?
A. He was crowding me too quick, I guess.
Q. Your brother shot him down before you could get out of the window; is that it?
A. Yes, sir.
Q. That is the way of it?
A. Yes, sir.
Q. You could have gotten out of the window if your brother had not shot him down?
A. I don't know whether I could have got out of the window or not.
70 Q. Why?
A. Because he was right close to me.
Q. He knocked you down I suppose?
A. No, sir; he did not knock me down.
Q. Made your face bleed?
A. No, sir.
Q. Cut your lip?
A. No, sir.
Q. Blacked your eye?
A. No, sir.
Q. He did not strike you very hard, did he?
A. He struck me pretty hard; it hurt.
Q. It did not bring blood anywhere.

A. No, sir.
Q. Nor bruise you anywhere?
A. No, sir.
Q. You called him a son of a bitch, didn't you, and tell him that he ought to pay you?
A. No, sir.
Q. I suppose you cussed him a little, didn't you?
A. No, sir.
Q. Wouldn't you cuss a man that wouldn't pay you?
A. No, sir.
Q. Now, Walter, you are not considered the very best boy up there are you? You run around and get a little sassy sometimes, don't you?
A. No, sir; I never sassed anybody.
Q. Did you hear Mr. Dillwood tell you not try to get the money and that he would get it?
A. No, sir.
Q. How many times did Frank shoot?
A. Twice.
Q. Where was Randall when the shot hit him the second time, when the second shot was fired?
A. He was right close to me.
Q. He had fallen down, had he not?
A. Yes, sir.
Q. Randall was not trying to get ahold of you then, was he?
A. I don't know.
Q. You don't know. He was killed?
A. Yes, sir.
Q. Then he was not trying to get ahold of you?
A. He fired both shots right together.
71 Q. Right together?
A. Yes, sir.
Q. He did not move away from the place where he fired the first shot, did he?
A. No, sir.
Q. Frank stood right in his tracks and fired both of the shots?
A. Yes, sir.
Q. About this fast (indicating by striking the hands together twice rapidly in succession)?
A. Yes, sir.
Q. Just as fast as he could pull the pistol off?
A. I don't know whether it was as fast as he could pull the pistol off, but mighty near it.
Q. He shot the second shot before he fell down?
A. No, sir; he was falling when he shot the second shot.
Q. He did not walk off a little piece and then come back and shoot him?
A. No, sir.
Q. You know that?
A. Yes, sir.
Q. You were watching it?
A. Yes, sir.

Q. You know now what you are talking about?
A. Yes, sir.
Q. Randall didn't have anything in his hands?
A. I never saw anything.
Q. How many times did he strike you?
A. He struck me; I don't know how many; I didn't count how many times that he struck me.
Q. Five or six or seven times?
A. I don't know how many times.
Q. Three or four times?
A. I suppose so.
Q. He struck you three or four times?
A. Yes, sir. He was striking at me when he was shot; coming around the end of the table striking at me.
Q. I suppose that he struck at you with his shut fist?
A. I don't know whether his fist was shut or not.

72 Q. You say that he did not make any bruises where he struck you any place?
A. No, sir.
Q. Then it was his fist?
A. I suppose so.
Q. He was jus' slapping you for calling him a son of a bitch?
A. I didn't call him a son of a bitch.

73 TOM DILLWOOD, having been duly sworn upon behalf of the defense, was examined by Mr. Frederick, and testified as follows, to wit:

Question. Is your name Tom Dillwood?
Answer. Yes, sir.
Q. Do you know the defendant, Frank Collins?
A. Yes, sir.
Q. Did you know Randall Lovely in his lifetime?
A. Yes, sir.
Q. Were you present at the time that Randall was shot?
A. Yes, sir.
Q. Tell the jury about it; how it came up.
A. Honey, Frank's little brother, was clerking for me behind the bar, and this Randall got a bottle of soda pop and would not pay him for it, and the little boy called me and told me, and I told him that was all right; I would get it, and I went and set down, and the next thing I 'new Randall was shot.
Q. Did you see any difficulty between Randall and the boy?
A. No, sir.
Q. Did you not see him whip the boy?
A. No, sir.
Q. How come you not to see it?
A. I was setting away back in the corner.
Q. You left the stand?
A. Yes, sir.
Q. You left and could not see what happened?

A. No, sir.
Q. You did not see any difficulty between the little boy and Randall?
A. No, sir.
Q. You simply saw the shooting?
A. No, sir; I didn't see the shooting; I didn't see him when he shot.
Q. Do you know whether he bought a second bottle from the
74 boy and would not pay him?
A. He did not say whether he bought a second bottle or not; he just said that he bought a bottle of soda pop and he would not pay for it.
Q. You did not see the shooting?
A. No, sir.
Q. That is all you know about it?
A. Yes, sir.
Q. Do you know whether Randall was sober that night or not?
A. He was drinking that night.
Q. What was his manner; did he have any fusses with anybody there that night?
A. He had been trying to raise a row with John Vann, I believe.
Q. The boys were most all afraid of him, were they not?
A. I don't know whether they were scared of him or not.
The DISTRICT ATTORNEY. There has been no foundation for anything of this kind.
Mr. FREDERICK (of counsel for defendant). You don't know whether they were scared of him or not?
A. No, sir.
Q. Do you know whether he was friendly with Frank Collins before this or not?
A. I guess so; they always looked friendly to me.
Q. You don't know; you are just guessing?
A. Yes, sir.
Q. Of course you need not guess at anything.
A. I don't know whether they were friendly or not.

Cross-examination by the DISTRICT ATTORNEY:

Q. You were running the stand?
A. Yes, sir.
Q. You had Honey behind the bar running it for you?
A. Yes, sir.
Q. Honey told you that Randall had bought a bottle of soda up there and would not pay him for it?
A. Yes, sir.
75 Q. You told him that you would get it?
A. Yes, sir.
Q. Did you hear Honey crying after that?
A. No, sir.
Q. Was he crying when he told you that?
A. No, sir.
Q. You did not hear him crying after that?
A. No, sir.
Q. You didn't hear him crying at all, did you?

A. No, sir; I never heard him crying.
Q. Where were you when the shooting occurred?
A. I was setting away back in the corner.
Q. There were two shots fired, were there not?
A. Yes, sir; I heard two shots fired.
Q. When you heard the first shot fired, what did you do?
A. I just set still; I thought it was out of doors.
Q. Did you hear anybody say anything when the first shot fired?
A. No, sir.
Q. Did you see the defendant after the first shot fired?
A. No, sir; after the first shot fired I just turned around and looked out of doors, and walked back to the stand to see what was going on.
Q. What did you find?
A. And this defendant was going on out of doors then.
Q. With his pistol in his hand?
A. Yes, sir.
Q. Did he say anything?
A. I never heard him say anything.
Q. What else did you find?
A. That is all.
Q. You didn't find a dead man there?
A. Yes, sir; there was a dead man there.
Q. Who was it?
A. Randall.
Q. Was he shot?
A. Yes, sir.
Q. Where was he shot?
A. I don't know, sir; I never did look.
76 Q. You didn't look to see that he was shot through the neck and back of the head?
A. No, sir.
Q. Did you ever see anything more of Collins after that until he was arrested?
A. A. I saw him that night.
Q. Where?
A. He was going down towards my house.
Q. What was he doing?
A. He was not doing anything, only going along the road.
Q. What was he going there for?
A. I don't know what he was going there for; he wasn't going to my house; he was going to the tank.
Q. Did you talk to him that night?
A. Yes, sir; he asked me if he killed the man, and I told him yes.
Q. Then he told you that he was going to leave the country, did he not?
A. Yes, sir.
Q. Where did he say that he was going?
A. He did not say.
Q. You told him that Randall was shot?
A. Yes, sir.
Q. Was he armed when you saw him that night?

A. I never saw any gun.

Q. It was down at the tank that you saw him?

A. No, sir; he was going down towards the tank.

Q. Was anybody else with you when he talked to you and told you that he was going to leave?

A. Yes, sir.

Q. Who else?

Emanuel Vann.

Q. That is one of his witnesses?

A. Yes, sir.

Mr. FREDERICK (of counsel for defense). You have told all you know about it?

A. Yes, sir.

77 J. E. DAWN, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Q. State your name?

A. J. E. Dawn.

Q. Were you at Ft. Gibson at the time that Randall Lovely was killed?

A. Yes, sir.

Q. Did you see the difficulty?

A. No, sir.

Q. Did you see the shooting?

A. No, sir; I left the hall just a few minutes before the shooting was done.

Q. Did you see the fuss between this little boy, Walter Shannon, and Randall?

A. No, sir; I seen a little quarrel but I paid no attention to it. I was in the back part of the hall where I could not see. It seems that he went up and got something, I didn't know what it was; that little boy was keeping the stand, and they had some words there, and the crowd kind of crow'ed up, and I could not see what they did do. I could not see what they were quarreling over.

Q. Could you hear what they were saying?

A. No, sir; I was too far back in the room.

Q. You didn't see any of the fuss?

A. No, sir; I was not close enough. I seen them, but I didn't know what they were fussing about.

Q. Did you hear Randall say anything to the boy, or the boy to Randall?

A. I didn't hear anyone talking but Randall.

Q. What did he say?

A. I don't know what he said; I heard his voice, and heard him talking pretty loud.

78 Q. Who was he talking to?

A. Honey; that little colored boy.

Q. Were you there when Randall came there that night?

A. I do not know whether I was or not; I went there about half past 8 o'clock, and I staid there—I don't know how long I did stay

there, but I staid until tolerable late, standing off in the corner watching them dance. I noticed that Randall was drinking, but I did not notice him have any difficulty with anyone.

Q. How long have you known Frank Collins.

A. Ever since I have been in Fort Gibson, between 5 and 6 years.

Q. Do you know his reputation for being a peaceable, law-abiding man.

A. As far as I know he has always been a peaceable, law-abiding man, or boy.

Cross-examination by the DISTRICT ATTORNEY:

Do you know what reputation is?

A. Only what people around there say.

Q. Only by hearsay?

A. That is all I know about it, from hearsay. I know that he is talked highly of by the best people there.

Q. What is your business there?

A. I drive a team, and drive a hack.

Q. Are you a white man or an Indian?

A. I am a white man.

Q. You were at that party that night?

A. Yes, sir; I was down there awhile.

Q. Did you dance any?

A. No, sir; I could not dance if I wanted to.

Q. I suppose you would like to have swung one of those darkies around the corner?

A. No, sir; I like to go and look at them, but not swing them.

79 Q. Right hand around; forward four, and swing the corners?

A. I don't know how it goes; I never tried it.

Q. You really do not know anything about the fuss at all; you heard Randall and the boy fussing?

A. Yes, sir.

Q. They were both fussing?

A. Yes, sir; I hear Randall say some few words; I don't know what they were?

Q. How long after you left before the shooting occurred?

A. I got nearly home.

Q. How far did you live?

A. I live about a block, maybe a little more than that.

Q. How many guns did you hear fired?

A. I only heard one fired.

80 ALECK KEMP, having been duly sworn, upon behalf of the defense, was examined by Mr. C. J. Frederick and testified as follows, to-wit:

Question. What is your name?

Answer. Aleck Kemp.

Q. Do you know Frank Collins?

A. Yes, sir.

Q. How long have you known him?

A. I have known him ever since he was a little boy.

Q. You are no akin to him, are you?

A. No, sir.

Q. Were you at the dance the night that Randall Lovely was killed?
A. Yes, sir.
Q. Tell us what you saw about it.
A. I was dancing on the right hand side of the house and Robert Ross was dancing on the foot, and Jonas Thompson he was dancing on the left hand side of the house, and Henry Nave came to me and asked me to let him dance in my place, and I told him no; and he kept on and wanted to raise a row, and I gave up to him and went back in a corner and crossed my legs on a table, and Nick Thornton came back where I was and Randall went off to where Buster's brother was, and I do not know how it started down there, but anyhow I saw him; he was hitting Honey across the table, and pretty soon I saw him go around the end of the table and then Buster he run down there in the corner and I seen the first shot fired, but I did not see the second shot fired. Before that—before the dance come up—me and him both started home. I had carried a lady there and he had carried his wife there, and then Henry Nave came to him and said,
"What are you going for? If you are going to be a man why
81 don't you be a man, and if you are going to be a child why don't you be a child?" I said to him, "Come on; let's go on," and he come and took a hold of Buster and took him back, and we went on the end of the porch and we had a bottle of Bon Tonic—I suppose that is the name of it; that is what they call it up there—me and him and Buster took a drink out of there, and he went back into the house to the dance and Randall went back in the corner and commenced raising a fuss with John Vann, and Mr. Steadman took him out of the house, and he came back again and we went out and took the last drink out of the bottle of Bon Tonic. He was feeling pretty good and I was feeling pretty good, so we started again—started home again—and he got Vann and got a hold of him and carried him back around the house—him and his wife—Randall did. He says, "God damn you, come back." I knew he was mad, because we had had several fights. He was an overbearing fellow, and he told me to come back, and I went back then and set on the porch until they got through talking. I don't know what they were talking around there——
Q. Go on and tell what you do know about it.
A. That is all I know about it.
Q. Did you see any of the fuss with the little boy?
A. I saw him hit the little boy across the table.
Q. What did he say?
A. I don't know what he said. I was away back up in the corner, that I wasn't close enough to hear what he said.
Q. What was he doing when Frank shot him?
A. He was walking around the table to get at him; kicking at him. He walked right around the end of the table, kicking at the little boy, and the boy was dodging back up in the corner next to the
82 window, but I don't know whether he was trying to get out or not.

Cross-examination by the DISTRICT ATTORNEY.

Q. What is your name?
A. Aleck Kemp.
Q. You have been here before, have you not?

A. I was here on Mr. Bates's case.
Q. When was that?
A. I was here last month.
Q. Is that the only time you were ever here?
A. No, sir; it is not the only time I was here.
Q. Have you been there before?
A. Yes, sir.
Q. What for?
A. On Joe Seey's case.
Q. Witness for the Government or the defense that time?
A. I was witness for the Government.
Q. Were you here at any other time?
A. Yes, sir; I was here at another court, when the court was over yonder in that other place.
Q. What for?
A. On that murder case, that soldier killing. I didn't know anything about it.
Q. It pays pretty well; you are making a good living out of it?
A. I don't know whether it pays or not. They had me subpœnaed down here for nothing; I didn't know anything about it.
Q. You are here nearly every term of court, are you not?
A. No, sir; not every term.
Q. How often have you been a witness at Muskogee?
A. I never had been a witness at Muskogee.
Q. You say that Randall was kicking at the boy?
A. Yes, sir; around the table, after he hit across the table.
Q. When he was shot he was kicking at him this way?
A. He came around the end of the table——
83 Q. Is there any other man in Fort Gibson that ever saw him kicking at the boy?
A. I don't know whether there is or not.
Q. I suppose the boy would know whether he was kicking at him or not?
A. I suppose he would.
Q. He would know more about it than you know—no, he would not know more about it than you. You can go.

84 EMANUEL VANN, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to-wit:

Question. What is your name?
Answer. Emanuel Vann.
Q. Do you know the defendant, Frank Collins?
A. Yes, sir.
Q. Did you know Randall Lovely in his life time?
A. Yes, sir.
Q. Were you at the dance the night that Randall was killed?
A. Yes, sir; I was there.
Q. Tell us what you saw there; tell us about it.
A. I could not tell you anything about the killing at all; I wasn't there when the killing took place.

Q. Did you see the difficulty between Randal and the little boy?
A. Yes, sir; I saw him slap at the little boy across the table.
Q. Did you see anything further than that?
A. No, sir.
Q. What did he say to the boy?
A. I didn't hear him say anything; I was standing off a little distance from him.
Q. What became of you then?
A. I went off up in town a little piece.
Q. What did you leave for?
A. I went up to the drug store to get a dose of medicine.
Q. The shooting happened after you left?
A. Yes, sir.

Mr. FREDERICK. If the court thinks it is competent I think I could prove threats made against this defendant. I could prove it by this witness and several witnesses.

The COURT. I do not think under the evidence it is competent.

You may save the point if you desire.

85 Mr. FREDERICK. No; I am of the opinion that the court is right.

Cross-examination by the DISTRICT ATTORNEY:

Q. This slapping of the boy occurred after you left the house, did it not?
A. No, sir; I was in the house at the time.
Q. How far did you get before you heard the shots fired?
A. I was right at the store.
Q. How far is that?
A. About 100 yards, as near as I can guess at it.
Q. Did you and Dillwood leave at the same time?
A. Yes, sir.
Q. Was this quarrel over with before you left?
A. Yes, sir.
Q. And then you went about 100 yards, and the shooting occurred?
A. Yes, sir.

86 FRANK COLLINNS, having been duly sworn in his own behalf, was examined by his counsel, Mr. C. J. Frederick, and testified as follows, to-wit:

Question. Go on and tell the jury how this thing occurred.

Answer. I have got up here to tell them the truth, and I am going to tell it to them. This man has been mad at me for two years because I would not help him steal $100.00 from a white man.

Q. Go on to this difficulty and tell about that.

A. Well, gentlemen of the jury, I will tell you how that was. My brother was keeping a stand there, this Emanuel Vann and my brother, and this deceased he goes up and gets a bottle of soda pop, and he takes and drinks the soda pop, and my little brother asked him to pay for it, and he refused to pay for it, and when he refused to pay for it——

Q. Do you know that of your own knowledge, or did you hear that? I want you to tell not what you heard, but what you know.

A. I am telling just like it was. And he would not pay my little brother for it, and my little brother asked him for it, and he hau's off and hit my little brother, and my little brother commenced crying, and by that reason I thought he was trying to raise a row with him, to raise a row with me, because he had been picking at me before that, and he was a bigger man than I was, and I was scared of him; and I knew right then that he was trying to pick a fuss out of me because he started with my little brother, and he told parties—and I can prove that—that he was going to kill me that night, and went and got a knife on purpose to kill me, said he was going to cut me all to pieces; he had whipped me
87 once before that, and I have got the scars on me now. That is the straight of the thing; that is the way it was.

Q. You shot him, did you?

A. Yes, sir; when he was knocking——

Q. What was he doing?

A. He was knocking my little brother over the table.

Q. How long before that was it that he whipped you?

A. He whipped me with a cow hide, and I have got the scars yet; it had been about 8 months before that. And that night I started home with my wife, and he came out there, and he said, "Where are you going?" And I said, "I am going home," and he speaks to my wife, and he says, "Linda, are you going home, too?" and she says, "Yes;" and when she says that me and her started off, and she said something to me, and he didn't hear it, I guess, and he said, "You God damned bitch, you can't repeat it over." Them is the very words that he said. When I started home I knew he was going to start a fuss out of, and that is the reason that I started home; I knew that he would kill me if he got a chance, and that is the reason I started home.

Q. How old are you?

A. I will be 18 years old the first day of October, I think.

Q. How long had you been married before then?

A. I had been married about 4 months, I reckon.

Q. You married very young, it seems?

A. Yes, sir; folks generally marry that way up in that country.

Q. After the shooting you went away, you say?

A. Yes, sir; I went over to my uncle's; I was scared that some of them might kill me, and I went over on the other side of Okmulgee; I didn't scout; I wasn't trying to keep out of the way of them; I went up to
88 Council two or three times; I worked right around my uncle's all the time. When they come there I gave up to them like a gentleman. I didn't try to scout.

Q. When were you arrested?

A. I could not tell just exactly when it was.

Cross-examination by the DISTRICT ATTORNEY:

You did not take your wife with you when you left?

A. No, sir.

Q. Who were you afraid of?

A. I was afraid that some of these fellows that were the friends of him would kill me.

Q. Did Randall have a knife or pistol in his hand?

A. He had a fork in his hand, I think; I don't know whether it was a fork or knife.

Q. I asked you if he had a knife or pistol?

A. I don't know that.

Q. Did he try to cut you?

A. Yes, sir; he had tried to cut me——

Q. That night; did he that night try to cut you?

A. Yes, sir; he tried to cut me on the outside when me and my wife was standing there.

Q. What became of his knife; why didn't you tell that before?

A. I just didn't think of it; that is the reason I didn't tell you.

Q. And you thought about what he said, but didn't think about his trying to cut you?

A. Yes, sir; I thought about what he had said.

Q. You didn't think about his trying to cut you?

89 A. That was on the outside when me and my wife was standing on the outside.

Q. You heard these witnesses testify that he had no knife about him; had nothing but a bunch of keys in his pockets?

A. I could not be responsible for the knife; I don't know what went with it. I know that he had one.

Q. Has that knife ever been found anywhere?

A. Not that I know of.

Q. The man that had no knife tried to cut you with a knife?

A. Not disputing your word at all, but he was trying to cut me when me and my wife was down there talking.

Q. Nobody ever saw him with a knife that night; he was found without a knife. What did you shoot him the second time for?

A. The two shots were fired just that quick.

Q. All the witnesses say you walked back and then turned and said you would finish him have been lying about it, have they?

A. Yes, sir; I didn't do any such a thing as that.

Q. You did not do that?

A. No, sir.

Q. You fired one right after the other?

A. Yes, sir.

Q. You shot both shots before he fell?

A. I don't know whether I shot both shots before he fell or not.

Q. You would not shoot him when he was down would you?

A. No, sir.

Q. Then you shot both shots before he fell?

A. Yes, sir; I would not shoot a man when he was down.

Q. Then you shot both shots while he was standing up?

A. Yes, sir.

Q. You said awhile ago that you didn't know, but now you say that he was standing up when you fired both shots?

A. I mean to tell you the truth about this; that is what I got up here for, your honor.

90 Q. I never heard a man say he was going to tell the truth in my life but what he did not do it. You fired the second shot; what did you shoot him for; what did you kill him for?

A. He was beating my little brother, and I knew he was trying to start a row out of me.

Q. That wouldn't necessarily start a row out of you; you could keep out of it?

A. I know you wouldn't let any man beat your brother like he was doing.

Q. That is what you shot him for, for beating your brother?

A. Yes, sir.

Testimony closed.
6.00 p. m.

91 This was all the evidence in the case.
The court then instructed the jury as follows:

92 IN THE CIRCUIT COURT OF THE UNITED STATES, WITHIN AND FOR THE WESTERN DISTRICT OF ARKANSAS.

August term, 1892.

UNITED STATES }
vs. } Murder.
FRANK COLLINS. }

Charge of the court, delivered August 11, 1892, 1:30 p. m.

PARKER, J.

Gentlemen, the defendant in this case is charged with having on the 25th of December, 1891, taken the life of Randall Lovely, by wilfully, and with malice aforethought, shooting him with a gun. In other words, he is charged in this indictment with having killed him in such a way as that he is guilty of the crime of murder. It is as to the truth or falsity of this charge that we are to make inquiry. We are to ascertain whether that charge is true or false. If it is found in the way contemplated by the law to be true, there is no escaping our duty in the premises. Our duty under such circumstances would be to find the defendant guilty of the crime of murder. If it is found in the way prescribed by the law to be false, if it is not established as contemplated by the law, our duty is equally plain to find the defendant not guilty as charged.

93 As I have remarked so often in cases of this kind, there are two things that must enter into your verdict. One is known as the truth of the case as you find it, and the other is the law applicable to that truth. For instance, you take the definition of the crime, and you measure the case, as you might say, in that definition just as the farmer measures his grain in his half bushel. There is a standard measure fixed by the law. If it is filled to a certain extent, it is said to be a legal half bushel. The merchant measures his cloth by a measure fixed by the law, called a yardstick. If a piece of cloth extends the length of the yardstick it is a legal yard. And so these crimes that the law defines are all measured by the definition that the law gives to them. Then we take the truth as you find it, and you apply to it that measure, and if you find that the things exist that the measure says shall exist—that is, the definition of the crime—it

is established; and the converse is true if they do not exist as required and as proclaimed by the law that they shall exist, and in which event there is no crime.

The first thing to find in this case in order, in our research, to ascertain the existence or nonexistence of the proposition required by the law, is whether or not Randall Lovely, the man who is alleged to have been killed by the defendant, is dead. That is the first inquiry. About that there is no controversy, and there is no ground for any, because all the evidence shows the fact that he is dead. The second inquiry that it becomes necessary for us to make is, did the deceased die by violence of the kind named in the indictment? You see we are simplifying this thing by taking apart the things that enter into the crime and go to make it up, and we take these little propositions one by one as we go along, enumerating them,
and in this way we ascertain whether they exist or not as shown
94 by the proof. Did the defendant take the life of the man alleged to have been killed by the means named in the indictment? The means named in the indictment is that he was killed with a gun. It is the same thing if the proof shows he was killed with a pistol. A gun, legally speaking, means a pistol as well. If the evidence in the case shows that the deceased, Lovely, received a wound, and that he shortly thereafter died, when he was apparently in good health at the time of the reception of the wound, under the rules of logic and of law you have such a reasonable state of case as that if you would hear of a circumstance of that kind, or witness it, as citizens outside of the jury box, being reasonable men, you would conclude that he died from the effect of that wound. You may, therefore, do likewise while you are in the jury box, because when a reasonable inference of that kind is made by a man of reasonable mind outside of the jury box he may make the same sort of inference in it from the same facts, and facts of that character are sufficient to lead a reasonable mind to conclude that he did die by violence of the kind named in the indictment. That is the second proposition necessary to be found. The third proposition is: Was the violence in the shape of the act which produced the death of Randall Lovely the act of the defendant? That is, did he shoot Lovely with a pistol so that he died? I say "pistol," because that is the proof, and there is no controversy over it at all. The defendant tells you so himself, and all the evidence tells you so, that he fired a shot that struck a vital part of his body, and shortly thereafter he died. That state of case, then, would be a state of case sufficiently strong to authorize you to infer it was his act of violence,
95 such as the indictment described, and that produced that deadly result. We therefore have the third proposition entering into the crime established, and we may put it aside with the others as a fact proven in the case beyond a reasonable doubt.

Was the act so done as to be done willfully and with malice aforethought? If it was, it is murder; because if the death of Randall Lovely was caused by violence inflicted willfully and with malice aforethought, such a death is produced in a way that the law denominates it murder. In this connection it becomes necessary that I should give to you this legal definition of that crime, because it is claimed for the defendant that if he is guilty he is guilty of a crime of less grade. I remind you that your duties are twofold. First, you are called upon to find if crime exists,

and that is a solemn duty. Secondly, you are called upon to characterize that crime, and correctly characterize it; that is, to name it and name it correctly. A mistake upon one point is just as serious as a mistake upon the other. It is the duty of the jury, then, to find if crime exists, and to properly name that crime. If it is murder, the due administration of the law calls upon us to say so, to say that it is murder under the law, because we can not compromise away the terms of the law. I am sorry to say it, and I say it without intent of affecting this case, that this compromising away of the law is the most serious evil of this age. It has become so serious that wherever there is wealth and power and influence human life can not be protected against it, as was witnessed but yesterday over here in a neighboring State, where a chicken-hearted governor, impressed by wealth, influence, and position at the bar, saved the
96 life of a miserable murderer, who should have been hung, and would have been hung if he had been a poor, defenseless man. These mistakes must not be made if we are to have the peace of the country preserved. They must not be made by governors or by jurymen. The jury must solemnly approach the performance of this great duty with a determination to perform it faithfully and well, at every cost and every hazard, because the responsibility of enforcing the law in the first instance is upon them. Then, your duty in this case, as in all others, is to find if crime exists. If you find it does not exist, your duty stops right there, except as you consummate your purpose that you are sworn to observe here by acquitting the party charged with the crime. That duty, of course, and that part of it, is just as solemn and imperative as the duty to find guilt if you find that crime exists. If you find that crime exists you must not make a mistake in misnaming that crime because it is perhaps a little more pleasant to you and I, and to all others, to do so. If we could say that no crime exists we would rather say so in every case where one of our fellow-citizens if charged with an offense that he is not guilty of; we would rather say that if we could, and if we could not say that we would rather say that he is guilty of a less crime than that which is characterized as murder. But we can not say this, except as our judgments are brought to honest conclusions by the light of the facts in the case, and the application of the law to these facts that become proven truths. That is the only way we can say it. In this connection it requires our closest attention that we may understand the definition of this high crime of murder, and that we may understand the definition of this other crime of less grade, because we do not want to make any mistake here. If the man
97 is guilty of a crime, and is not guilty of anything but manslaughter, it is a grave mistake to say that he is guilty of anything more, under the law; but if he is guilty of a crime, and that crime is murder, for the public good we must not make a mistake in naming it something else. Therefore, I say, it requires our closest thought in this case that we may understand correctly the definition of these states of case, one of which is murder and the other manslaughter, and to what set of facts these definitions are applicable. I can not do better in this case than to give you the same definition of the crime of murder that has been given heretofore in other cases in this court, the words that enter into this definition, going to characterize it, going to make it up—the word "willful," and the phrase "malice aforethought"—they going to show what sort of

an offense it is. In the absence of these characterising words there is nothing to distinguish the crime of murder from any other degree of homicide. Therefore it is highly important that we should understand correctly and fully the meaning of these expressions, because they are the characterising forces that make up this offense. The word "willful" has a legal meaning, as has also the phrase "malice aforethought." You will learn when I give you these meanings in the language of the law that they have a broader and more comprehensive meaning when applied to a state of case where it is charged that human life has been taken in a murderous way than when the words are used ordinarily; that is, "willfully" comprehends more than it ordinarily does. We use the word ordinarily, and when we do so we undertake to comprehend a meaning that grows out of a particular purpose to do a thing. You will
98 learn that the law gives a wider range to it than we do. And so with "malice aforethought;" it is more comprehensive than the word "malice;" and this must be so for the protection of human life. You take, for example, a state of case where a man kills another who he never knew before, never saw before. He could not have any particular spite against him; he has no hatred against him, except that general malevolence that enters into his mind, that he entertains there against all men, that makes him reckless of human life; still he has in his mind that which, when it ripens into act, and that act produces death, is said to be malice aforethought, and the death is said to have been produced with malice aforethought. That is not the meaning of the word, the law says, as we understand it commonly, because that means special spite, or malevolence, or peculiar hatred, or animosity against a particular person. The law says that—

"The word "wilful," as used in connection with a charge of murder, such as is preferred in the indictment against this defendant, means an intentional killing, and not an accidental killing."

You might inquire in that connection whether the intent must exist specifically to produce the death, or whether it is sufficient for the party to do an act intentionally which is an act that may kill, regardless of the consequences, whether that fills out the requisite of this definition. I say to you that it is. A man goes out here and he does not see anybody on the streets; he knows that they are constantly travelled by men, women, and children; he shoots up and down the street; there is no specific willful purpose to take anybody's life, but the law says that the act of killing, if death ensues from it, is willful, because the act of shooting is intentionally done, and is willful; and when an act of that character is
99 willfully done, because of the usual connection between the act and the result, the party is held to have intended, and consequently to have willed the result.

"It means an act which results in death that is intentionally done, and one that is not accidentally done."

It means, in other words, the doing of all acts which produce death that are not comprehended by the word "accident." They belong to two classes. One classification springs into existence because of a particular condition of the mind of the man doing that act; and the other one springs into existence from the condition of mind that produces a state of carelessness upon the part of the possessor of that mind so far as that he does not care

what may be the consequences of his act. If he does an act willfully in either case, and the result follows, and that result is death, the law says that he willfully produced the death. That is right, is it not? Isn't that reasonable? Isn't that in the interest of the protection of human life? You destroy the rule, abrogate, disregard, or fail to enforce it, and you at once see what a state of chaotic confusion, of destructive violence, reigns supreme, in place of that peace, law, and order that arises out of a correct, full, and impartial enforcement of these principles of the law that are given to us for our own safety, for our own security, and for the protection of ourselves and our fellows. They are acts of violence that may spring out of either a recklessness of purpose or from a specific and consequently a peculiarly willful purpose.

The law says:

"There is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident."

That is just what it does. It says that everything that is not an
100 accident is intentionally done, and that law must be observed to protect life.

"Every act that produces death that is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from the condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature and the way it is executed, as a natural and probable result death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the care that the law requires to be exercised to prevent its occurrence is observed."

You will understand in this connection that the law places upon us great duties. We have great rights, each of us, and rights that are recognized as cardinal, as fundamental, that we bring with us into a state of society, that spring into existence and attach to us the very moment our existence begins—first, the right to life, and second, the right to liberty, when we do not forfeit either one of them. Now, these rights can not exist without the existence of correlative duties, the performance of which are necessary to protect these rights. These rights belong to each and every one of us until they are forfeited by crime, and there are duties devolving upon each and every one, and we can not escape these duties, nocan we fail to perform them and do our duty. Now, the duty, and the highest duty, of every man is to recognize the fact that every other man as well as himself has a right to his life, and that he must do whatever is in his power under the circumstances to protect that life, to see that it is kept secure, and that it is not wantonly and wickedly destroyed. Is not that a just principle? It is the very quintessence of the Golden Rule, to do unto others as you would others would do unto you. And we are required to perform our duties, to recognize that others have
101 a right to live as well as ourselves, and they can not enjoy that right unless we assist them in protecting it against specific and particular and intentional acts of violence, as well as against acts where they

have not observed the great duties of life. It is our duty to exercise care to see to it that the life is not recklessly and wantonly and wickedly destroyed. The latter is a state of case to which the law attaches willfulness, or intent, as well as the former. And we are required by the law to exercise the amount of legal care exacted by the law to see that nothing occurs that is deleterious or destructive of human life.

The law says that:

"When a man does an act which naturally or reasonably or probably, from its nature, and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional. For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a willful act upon his part. And when that state of facts exists, the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can be found only by inference."

It can only be found by inference. You can only find it in that way—by circumstances, concluding from a state of case as to what the condition of the mind was, as to whether the act was done willfully or not. Now, what kind of circumstances, you would naturally inquire, are you to look to to find
that. You are not to hunt for some peculiar condition to find
102 it. You are simply to apply the natural and reasonable rules you apply in coming to the everyday conclusions of life. You see a man going through the woods with an ax on his shoulder. He does not tell you that he is going to chop wood with it, or make rails, or something of that kind, but you know it from the movements he makes, from the direction he is going, and from all these circumstances you know that that is his mental purpose. You see a man with a gun on his shoulder; you see him draw that gun and present it at a fellow-being, and fire it upon him. Ordinarily you would conclude that he meant to do him great violence, because you know a gun will produce that result when used in that way. You see that it is used in that way, and from the use of it, from the character of the weapon, as reasonable men you naturally conclude that he intends to do that thing, to produce an act of that kind. You exactly conclude that. You can only do that by the light of these circumstances, because a man's mind is so constructed, and its nature is so delicate, that you can not observe it like you can a piece of great machinery that does its work in your presence so you can see its movements, see the movement of every wheel and every piston. You can not do that with reference to the mind. Therefore when we come to consider these elements which go to characterize the crime of murder as a crime, and to make it a crime, you never can look at them and prove their existence, except by circumstances. And I consequently assert it as a fact that there can never be any conviction in any case of crime in any case where the crime is of any magnitude, unless you depend wholly upon circumstances to find this neces-

sary element of it. Then in the face of that fact you all recognize how dangerous and foolish and wicked is the assertion that a man should never
103 be convicted by circumstantial evidence. I say it is wicked to make use of such an expression, because whenever a man makes an assertion the moral effect of which is to destroy the power of the law for the protection of his fellow men, he is making a wicked assertion, whether he intends to do it or not. Whenever a man is so foolish as to make the assertion that it is not right and proper to convict a man by the light of circumstantial evidence he is making an assertion that undoes the whole power of the law and leaves us at the mercy of the banditti and assassin. That is the truth about it. It is a wicked assertion, coming either from the fool or the knave. There is no such assertion authorized by the law of morals or the law of the land, but the contrary is the invariable rule—that we are to view these cases where crime is charged to find the elements that go to make them up which have an existence only in the mind, by the light of circumstances alone, because we can fathom the workings of the mind in no other way. It is a usual, natural, and reasonable method then to get at the condition of the mind of the party at the time he acts.

"Intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonable are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents a gun or a pistol at another and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural or probable or reasonable."

Now, I might stop right here in this case on that definition, because I believe you all understand it, but I will go a little further in this case for the reason there are two classes of crime
104 claimed to exist in this case. That is to say, the Government, through the district attorney, claims that murder exists; and the gentleman who conducted the case for the defendant claims that if there is any crime at all it is only manslaughter. It is therefore necessary in a case of that kind that you should know with even greater precision than otherwise the definition of these terms which characterize murder and distinguish it from the crime of manslaughter, or from a killing that is excuseable. In a case of this kind, then, when you are called upon to find whether the party intends to kill or not, you find first whether he presented the deadly weapon in shooting distance at the party that he killed, or that was killed, and fired it at him; whether that act was a willful act. And when you find that from the character of the weapon used, and the manner of its use, for the reason that a weapon can not use itself, can not present itself, it can not pull its own trigger, of its own accord, of its own will power, because it has none, and send the deadly missile into the body of the man who is killed—there is an intelligent power that does all that—and I say, therefore, when you find a gun or pistol has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the con-

clusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result. That is to say, when he willfully draws a gun or pistol, as in this case, and presents it at another, and pulls the trigger, and the ball goes whizzing into the vitals of the man killed, when he does that act willfully the result is
105 willful; it is his result, because the law holds him to know, first, that that weapon is made for the purpose of destroying life, and to know further that when used in a certain way it will destroy life as a natural and usual consequence; and because of that known connection, as I have told you, and the nature of the weapon used, if you find it was willfully used, and you do find it, you must find it, when you find it drawn and presented, because it is an automaton, it is inanimate, and the act of doing that is evidence of will power being exerted, and you take that circumstance just as when you get to the other characteristic of murder known as malice aforethought, if you find previous preparation to do the deed, as I will tell you after awhile, by the deliberate selection and use of a deadly weapon, you have a state of case that evidences a condition of mind where malice aforethought exists, the law says.

Now, a further word in this connection as to how you may find the act was willfully done. I will now read from the charge of Chief Justice Shaw in a case decided some years ago in the State of Massachusetts, the case of the Commonwealth v. York, 9 Metc., 103:

"The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily o' willfully does an act which has a direct tendency to destroy another's life the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do some great bodily harm is a necessary conclusion from the act."

106 You take the act as the law tells you, and if the act is of that character that it would usually destroy life you may find that the act was willfully done, and you must conclude as reasonable men, by the law of logic and by the civil law of the land, that the party intended that result. You can arrive at no other conclusion, and you do not arrive at and other conclusion when you are passing upon the ordinary concerns of life as citizens outside of the jury box. You adopt rational rules, and you arrive at a reasonable conclusion in your minds. That is all you have to do here; nothing more, nothing less. You see when you come to understand that the conclusions drawn by you as jurymen are precisely the conclusions that the law of morals commands you to draw or not to draw, as the case may be, as citizens, you find you are doing nothing more here than what you are called upon to do every day in the walks of life. Now, that is sufficient, I apprehend, as a definition of the word "willfully" as

used in these cases. It must be an intentional act producing death, because intentionally in this connection means willfully, the law says.

We now come to the other requisite of this offense, which is the distinguishing feature of the crime of murder. This element I have given you is possessed in common with a killing that is murder, and with a killing that is manslaughter, and with a killing that is justifiable under the law of self-defense. A man confronts you with deadly danger; the fact that you comprehend it, the fact that you conceive the condition and act upon it as the law gives you the right to do, shows that you will that which you do, and if death follows under such circumstances the death in that case is willful. I call your attention to this to show you that the word "willful" as used
107 in this connection, is not the distinguis'ing characteristic of the crime of murder, but it is the other element which is known as malice aforethought. Malice aforethought, like willfully, is something that originates from the mind of the party doing the act, and we must find some way of getting at the condition of the mind that is doing that act, if we are to act intelligently, because we are required to find it. If it is a mental condition there must be some way given to us by the law to arrive at that condition, or our work is folly and valueless, and the law becomes a system of nonsense. It is not that; it is the very quintessence of wisdom. It has been said, and wisely, correctly and forcible said, that it is the gathered wisdom of ages. It does not enjoin duties upon us and then say we shall not or can not perform them. In this case, as in any other where you have to arrive at the existence of this thing called "malice aforethought," as we can not fathom the mind, as we can not penetrate its inmost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder spring from the condition of the mind of the party. The law says we may do it by circumstances. We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what manner of act it is, bringing to bear upon a condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsi-
108 ble duties devolving upon them as jurors. As I have remarked to you before, when malice aforethought exists, murder exists. Now, let us see what is meant by that; let us get a proper understanding of it if we can; let us comprehend it fully, that you may make a proper application of it to the facts in this case. If the facts show that it exists in this case, or that Randall Lovely's life was taken willfully, and this other element surrounded the transaction, known as malice aforethought, the killing of Randall Lovely would necessarily be murder and nothing else. Now, what is this element of this crime? It is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to

show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us again see *see* how the law defines it, and then again how the law tells us it may be found to exist. It can only be found by circumstances, because malice aforethought, like wilfully, is something which exists in the mind that is necessary to be found to make up the elements of the case; and as you cannot get into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it) you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that
109 which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or a criminal act, and if a criminal act, what was the nature of that criminal act." The way a man does a thing goes to characterize it. If he does it in such a way as to show that the condition was forced upon him of a certain character that he could not avoid, and there was danger, for example, to his life, then and there confronting him, or apparently so, you would judge of his action by the light of that condition, by the light of the facts that surround him; and if in the light of the evidence he acted in the way that men would ordinarily act when defending themselves you would then have the measure that you could apply to the case in the shape of the usual conduct of men under like circumstances; but if he acted in an unusual, heartless, brutal, and willful way in taking the life, showing moral depravity, showing recklessness of life, showing a manifest purpose to seek vengeance, when the necessity for no further action existed of that kind, you could take that into consideration and use it in characterising the act. Then, from the surrounding circumstances of this case as any other, from the character of the weapon used, and the manner of its use, from the very result produced by that use, from the repeated use of that deadly weapon, you have a right to take into consideration all of these things for the purpose of
110 enabling you to characterise this offense, because that is the second great duty that you are called upon to perform. The law says it is from the nature of the transaction, the nature of what takes place, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the act done.

"Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in the law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man will-

fully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person except of abandoned heart would be guilty of such an act upon a slight, or upon no apparent, cause.

"Malice is an intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty and deliberately bent upon mischief. It imports premeditation."

That is, thought of beforehand.

Now, how long must a man think of producing death in order to make him guilty? Not for a month, or a day, or an hour, for that matter, in this day and age of the world when a man can so readily execute a deadly purpose by means of weapons, although he may conceive the purpose then and there and may execute it. The test is, when an occur'ence of that kind is proven, whether or not he made previous preparation to do the deadly act. If he did, and he does it when it is not necessary to defend his own life, it is murder, or it is this state of case called manslaughter, as you will learn after awhile, which springs into existence suddenly from a
111 disturbed condition of the mind when the party acts when he has not prepared himself previously to the doing of the deed, or deliberately or specifically attempted to execute the deadly design, but he simply executes the deadly design upon the spur of the moment, without previous preparation by the selection of a deadly weapon.

The law says:

"There must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind aud heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to dosome other wrongful act of a wicked and malignant and criminal character, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces a formed design to do such mischief as may deprive a fellow-being of life."

A man contemplates a purpose to kill; he prepares himself for that purpose, and he uses in furtherance of that purpose deadly violence. That

is murder, because of the fact that he contemplated that purpose to kill, and of preparing to execute it; there is shown premeditation. The other state of case is one that springs into existence then and there, from some provocation created by the party killed, and he acts while that provocation is supposed to have its influence.

"Malice aforethought is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent
112 of the man's heart at the time. You can not tell it by direct proof, bearing in mind the distinction between those two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

If it were possible for you to apply any one of the five senses to a man's mental condition at the time, if you could see that condition, that would be positive proof it. If you could see it, or hear it, or smell it, or taste it, or touch it, or if you could apply any of the five senses to it, you would have positive proof demonstrating its existence. But you can not do that. Therefore you are required to resort to the best means at hand that can be used for the purpose of ascertaining the mental condition.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we find the statement laid down in reported cases and by text-writers that malice is to be inferred from the use of a deadly weapon."

Now, without qualification, that might be misleading. For example, if you find a bullet hole in a man's body, as in this case, and if there had been no evidence at all of the use of a deadly weapon, no explanation of the occurrence but that, that is a state of case where you would have the right to infer, not from the fact of death, but from the nature of the means used to produce that death, that it was murder; because, unless a state of case of that character producing a result of that kind is overthrown by
112½ some explanatory proof showing the rightful use of that weapon, or showing the use of it under mitigating circumstances, the evidence of the use of it, the deliberate selection and use of the weapons shows a state of case where the party has malice aforethought, because it shows the doing of a wrongful act without just cause or excuse and in the absence of that which justifies or mitigates. That is what is meant by that rule, and in justice to parties on trial, of course it should be modified to that extent. An old declaration was made that the proof of death was proof of murder. Well, practically, that is so, because when you go to prove a death you either prove the means used or you prove that which is equivalent to proof of the means used as a fact showing malice aforethought. For instance, you take the case I have put; you have the

butlet-hole that shows the means used; there is no explanation of this means, and from that alone you would infer murder, just as you would if you would find a dead body laying out there with a bullet-hole in it, you would conclude it was murder if it wasn't explained to you. You have another case that often occurs, when the dead body is destroyed for the purpose of preventing discovery or identification, and the law says that obliteration of the evidence of a crime is a fact that is potential in its proving power to show that the crime was a crime of the highest grade, because men who kill in self-defense do not do that; they do not want to cover up. You take an honest, conscientious man who is driven to the necessity of taking the life of a fellow-being in order to protect his own life, and he desires to have the thing investigated at once, because he of all others in the wide, wide world wants to have his conduct thrown open to the
113 light of day, that his act, if justifiable, may be known by all men. The burden then is hard enough for him to bear, even with the approbation of all his fellows. I say, therefore, that you may take the declaration that the proof of the killing shows murder as true, because the act of killing is never presented to a jury in the abstract. The proof which shows the killing either shows the means used or the concealment of the body, and other facts which go to show malice, go to show crime, and go to show a purpose to conceal the act from the eyes of men, and that is the highest evidence of a criminal purpose.

"Malice is to be inferred from the attending circumstances which surround the transaction, and the jury have a right and it is their duty to look at those attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

"Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly exists in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand."

You will learn presently that if a man, even in a combat with his fellowman, kills another, because that other has entered into a combat with him, and although that other might be doing acts of violence that would give him who slays the right to slay, yet if the killing occurs in that
114 combat there are certain circumstances, certain conditions, where the party would have the right to ask that his crime be reduced in degree—that is, that the offense be mitigated, but even in a combat, in an affray where violence of some character is being used, but not violence of

the kind that would give one the right to defend to the death against its infliction, I say even if that affray is existing, if the party who enters into it has prepared himself with a deadly weapon, or does prepare himself with a deadly weapon during that affray for the purpose of then and there using it when it is not necessary to use it for the protection of his life or the life of a party that he has a right to defend, there is a state of case that comes within the principle of this law that says that the deliberate selection and use of a deadly weapon in a state of case where the party has no right to use it is evidence of premeditation, and consequently evidence of malice. That is what the law says. That is the way you are to go at it. You will learn when you come to hear the definition of manslaughter, that that is a state of case where the party can not enter into it with the purpose to slay. If he does that, no matter that there is an affray going on, the fact of his entering into it with that purpose shows that he thought of or designed to kill before he entered into this affray; and if it is a condition that grows out of an act of violence which constitutes the affray or constitutes a mitigating fact or circumstance in the case, and if the purpose to kill existed before that, then it does not stop because of that, but exists because it was prompted and conceived and the design was formed before the affray commenced. That is what is meant by this rule
115 that I have just given to you, that the deliberate selection and use of a deadly weapon is evidence of a premeditated purpose to kill, and whenever there is a premeditated purpose to kill, and to kill wrongfully, and when the party has no right to do it, it takes it out of the case that is the second degree of crime, known as manslaughter, because that is something that springs up suddenly, where the mind of the man is inflamed by sudden passion; and he has not any formed design as evidenced by the preparation with a deadly weapon, but from the influence of a hasty passion generated by the act of the other party. When he is in that condition it is an act, provided he does not do it in a brutal or unusual or unnatural way, which may be classified as manslaughter and not murder.

"The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand; and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon with the purpose of using it in a wicked or unlawful enterprise, if it be one of that character enabling him to consummate and carry out the enterprise, the selection of a weapon for that purpose is evidence of the existence of a purpose to do a wrongful act without just cause or excuse, in such a way as to show that the party who does it has a heart void of social duty, and a mind fatally bent on mischief."

The "heart," of course, is but a figure of speech. It is the mind alone that causes him to forget the social duty that devolves upon him to protect human life rather than to destroy it, and the fact that he does an act as a part of a premediated purpose, as the result of the premeditated use of a deadly wespon, shows that he has a mind fatally bent on mischief—mischief such as the death of the party. Therefore, that is the general definition of malice: He who slays another in such a way and under such circumstances as to show that he has a heart void of social duty, and a mind fatally bent on mischief, and it is an act that is characterized as an
116 act having attending it malice aforethought, and if the act is one which produces death, the death is murder under the law, because

when such a state of case as that exists it shows a purpose to do an act without just cause or excuse. Now, that is the way you are to find this element of the crime of murder. You, for example, go to the killing; you ascertain how the killing was produced, the way it transpired, the way it was done, whether the violence was repeated, what was the condition of the party slain at the time of the firing of the second shot, what was the necessity for that act, even if the first one had been an act that under the law could be justified. You are to look to the humanity or inhumanity so exercised by the defendant at the time. If it was an act that was shown to be brutal and inhuman and wicked and malignant in its nature, you have a right to take it into consideration in going to characterize the purpose of the party in executing the deadly design, because that second shooting may be taken into account as a characterising fact as well as the first shot. It is to be taken into account with it, together with all the surrounding facts and circumstances in the case.

"You ascertain how the killing was produced, the way it transpired, the way it was done; you see what character of weapon was used, you see whether that weapon was prepared beforehand, whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done, if there is an absence from the cause of that which shows that the party had the right to so willfully kill upon the law of self-defense, or that the killing was willful, but there were mitigating facts attending it, the proof which shows it was willfully done shows it was done with malice aforethought; and in a case of that kind the very same degree of proof that establishes a willful killing would establish a killing with malice aforethought."

Now then, these are the two elements that go to make up this crime, that the act was done willfully, and done with malice aforethought.

117 I have undertaken to define both of them, and I have undertaken to tell you how you may find their existence.

The other crime that has been invoked as the one that is properly applicable to this case is the crime that is named by the law as manslaughter. It is the only crime affecting human life that is defined by the statute. The crime of murder is not defined by the statute which provides for its punishment, but the statute was enacted in 1789, and it was enacted in the light of the law of murder, as described under what we call the common law of that time, and the definition given to the crime of murder now is substantially the same as that given by the common law. Section 5341 of the Revised Statutes of the United States provides that—

"Every person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, unlawfully and willfully, but without malice strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stab'ing, wounding, shooting, or other injury, such person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

Now, that is the definition that is given by the statute, and it is just exactly like the one given generally, which says it means the willful killing of another without malice aforethought. There is not in the case, in other words, this element that goes to characterise and distinguish the crime of murder from all other acts of that character. The common law says about the same substantially that I have read to you from the statute

in reference to the definition of this crime. There are two kinds of manslaughter, viz, voluntary and involuntary. Voluntary manslaughter is where the act is done willfully which produced the death. Involuntary manslaughter may spring out of a case where the act even is not willfully done, but that the party could have prevented its being done in that
118 way if he exercised proper care, the care that the law exacts of him. For instance, where an engineer is running his train loaded with passengers along the road and he sees a switch open, and he is careless about checking his engine, and while he does not mean to destroy the lives of the people on the train, he does not mean to run his engine into that open switch and wreck the train, but he is careless; he does not apply proper diligence; he does not properly exert himself to prevent the result, and because he does not do that the law says his act is willful. Out of the involuntary condition of mind that exists either not to do that specific thing particularly, or do some other thing that may produce the same result as though he had a specific purpose to do it, there springs a state of case that is called, if death ensues, involuntary manslaughter. Voluntary manslaughter, we are told, is a state of case where death has been caused where the act is willful; it is yet not a case of murder, for it does not possess the other characteristic of murder known as malice aforethought.

The law says:

"Voluntary manslaughter is the unlawful killing of another without malice, upon sudden quarrel, or in the heat of passion. For example, where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they upon such occasion go out and fight in a field; for this is one continued act of passion. So also if a man be provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being se defendendo. In these and such like cases the law, kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt the cool, deliberate act and the result of hasty passion."

Let us see what this means. In order to give the party the right to claim that his act is manslaughter there must be a condition of hasty passion. That is one condition that alone can not reduce the man's
119 crime, because there is passion. It is sometimes hasty when a man slays in the most murderous way; there is a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition where he contemplates the rights of others and observes these rights, but it is in a condition of fury. He frequently creates that condition by the use of stimulants, nerves himself up for the very purpose. When he does it it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there was no time for the passion of the party to cool. That is what it means, and the offense is mitigated because of the wrongful act of the other party, who is committing that act at the time of the slaying. Now, as I have already told you substantially, if the other party is doing a wrongful act at the time that he is slain—and when I speak of a wrongful act I speak of one that would

not give the party the right to defend to the death, and the slapping of the boy in this case, or the controversy he had with his brother, would not do that, because if violence of that character was done the defendant it wouldn't give him the right to slay, nor would it give him the right to slay him when it was used on his brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where his life is imperilled, and use the same violence as he would in his own case. But suppose that during the time
that condition existed, and the doing of the act has a tendency to in-
120 furiate the mind of the party, if he then, without previous preparation, or without preparation at that time, should take the life of the deceased, that would be manslaughter. But if he prepared himself with a deadly weapon, showing a preconceived design to do an act of a deadly character, prepares himself with a deadly weapon, and uses it when it was not necessary to be used to save life, or to prevent great violence, the fact of the deliberate selection and use of the deadly weapon puts it out of the category of this definition of manslaughter, because that is a state of case where the purpose of killing springs into existence as an effort or desire of an inflamed condition of the mind, and where it can not spring into existence because of previous preparation or a preconceived design to use a deadly weapon. Now, if two men are in an affray that is not deadly, that is not really dangerous, but is of the character that may inflame the passion of each of them and one of them suddenly, without any previous design, does an act that is deadly in its character, that brings a deadly result, that is exactly within the definition of manslaughter. But if that party deliberately selects and uses a deadly weapon, the fact of selecting that weapon and using it in that way is evidence of premeditation, and manslaughter exists when there is an entire absence of premeditation.

Now, let us see a little further as to cases that touch upon this principle, and we frequently get a good deal of light from other cases where the principle has been passed upon and declared, and here is an old English case, but still it states the law just as we recognize it, and states it correctly:

"If a person being in possession of a deadly weapon, enter into a
121 contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion in consequence of an attack made upon him, it will be manslaughter."

That is a better statement of it than I have been able to give you, stating the same principles in a more precise way, and I believe I will read it over to you again, because it is a synoptical statement of the proposition.

"If a person, being in possession of a deadly weapon, enter into a controversy with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be murder."

It could not be anything else.

"But if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter."

The facts in this case are short, and I believe I will read them to you. It is the case of Regina v. Smith (8 Car. & Pay., 160):

"The prisoner was charged, on the coroner's inquisition, with the willful murder of James Chaplin; he was also indicted for killing and slaying him.

"The prisoner was a private of the Cold Stream Guards, and was discharged on the 11th of October; and on the evening of that day went to the Three Horseshoes, at Hampstead, in company with a person named Burkhill, and his brother, Richard Smith. There were two more soldiers in the public house. A dispute arose about paying the reckoning, and a fight took place between the prisoner and a man named Burrows. In the scuffle Burrows fell down by the fireplace on his knees, and the deceased jumped over the table and struck the prisoner. The deceased was turned out by the landlord, but was admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out."

That is, the man who did the killing, and his brother, went out.

"The deceased remained about a quarter of an hour after the prisoner, and then left. The deceased tried to get out directly after the prisoner and his brother left, but was detained by the persons in the room. As soon as they let him go he jumped over the table and went out of the house, saying, as he went, that if he caught them he would serve them out. The deceased was a person who boasted of his powers as a fighter. He followed the prisoner and his brother into a mews not far from the
122 place where they had been drinking, and a witness who lived near, stated that he heard a noise and went to the door of his house and then heard a bayonet fall on the ground, and on going out into Church Lane, heard a person named Croft crying out, 'Police! police! a man is stabbed;' and, on going up, found the deceased laying on the ground wounded. Croft stated that he was in Field Place, near Church Lane, and heard voices, which induced him to run towards a bar there, and when within a yard of the bar, he heard a blow like the blow of a fist. This was followed by other blows; and after the blows he heard a voice say, 'Take that;' and in half a minute, to the best of his judgment, the same voice said, 'He has stabbed me.' The wounded man then ran toward him, and he discovered it to be the deceased. He said 'I am stabbed,' three times, and soon after fell on the ground. The prisoner was soon afterward taken into custody, and was then bleeding at the nose. Several other witnesses were examined; the prisoner had no side-arms, but his brother, who was with him, had a bayonet.

"For the defense, the prisoner's brother was called as a witness, and stated that when they had got about twenty yards through the bar mentioned in Croft's evidence, he heard somebody say something, but did not take notice of it, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner, who had gone on. There was a short struggle between them, and very shortly after, the deceased cried out, "I am stabbed! I am stabbed!"

"Several other witnesses called, who proved that there were wounds on the prisoner's hands, such as would be made by the stabs of a bayonet, and that his back was one uniform bruise. It was suggested, during the ex-

amination of another surgeon, who examined the body of the deceased after death that the deceased might have fallen upon the bayonet, and so received the wound; but he said he could not imagine any position in which the deceased could fall, to have caused the instrument to take the direction which it did.

"Bosanquet, J., in summing up (Bolland, B., and Coltman, J., being present), said: 'The prisoner stands charged upon the coroner's inquisition with the crime of murder, and is also indicted for the lesser offense of manslaughter. The question for you, on a careful consideration of the evidence, will be, whether he was guilty of either the one or the other, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excuseable. Upon the question of whether it amounts to murder, you will have to consider this: Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did it will amount to murder. But if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? If he did, then it will be manslaughter."

That is all of the case bearing upon the point in this case.
123 Again, we have the statement of the principle in another case, a case decided by the supreme court of North Carolina, The State v. Scott (4 Iredell, 409), where Chief Justice Ruffin lays down this principle:

"In a case of mortal combat upon words of reproach or other sudden provocation, if one of the parties takes an undue advantage, as by drawing his sword and making an assault before the other has an opportunity to draw his, it is settled that it is murder. And so here, where one of the parties drew his knife without notice to the other, who expected only a fight without weapons, as the other knew, it would seem, even if they actually engaged in the fight, that the former stabbing the other must be murder; for it is plain that the slayer intended a fight as well as the other, but he did not intend a fair fight, as a trial of natural strength, but sought the other's blood."

Now, these propositions are cases of course that are upon the ground where there was an actual combat going on at the time of the killing. If there had been a combat and it had ceased, and there was time for the blood of the party to cool after that combat, and he used deadly violence, that would be murder, for the reason that the law ascribes the use of that violence to a deliberate purpose rather than to a heated condition of mind. In this connection you will understand that when we speak of a combat or affray, you are to find that existing, or as having an existence. It may have an existence if it was an affray between the deceased and a brother of this defendant as well as between him and the deceased, because a man occupies precisely the same relation by way of defending and looking after the rights and the life of a relative as he does of his own. If it was true that the deceased was simply hitting the boy with his hands or fist, that fact, if it existed would not give the defendant the right to select and use a deadly weapon for the purpose of preventing an occurrence of that kind; and especially would he be out of line with the law if he
was to use that weapon in such a way as to show brutality of
124 purpose, as to show wickedness of mind, as to show recklessness of life, by shooting a man after he had been shot, or shooting him in

such a way as to characterise his mental condition as being one that was reckless and regardless of the existence of human life. You may take into consideration any facts of that kind as to what was his condition of mind at that time; whether he expected to execute an act of vengeance because of a deliberate design and purpose formed to do a deadly act, or whether he was at that time under a heated condition of mind produced by this affray between the parties. If the affray was over, if it had an existence which had ceased, then you are to look to see what time had passed away before the shooting, because a man, even though he may shoot after an affray, to avail himself of the claim that he may have his offense reduced in degree to manslaughter because of the inflamed condition of the mind, must act so soon after that condition as that the mind did not have time to cool or the passion to subside.

Now these are the legal principles that have been invoked in this case. I am not going to take up your time by giving you the law of self-defense because I do not think it is applicable in this case, nor has it been asked for by the counsel representing the defendant. I might take up your time perhaps to give you the definition of self-defense, that you might see, the more plainly by contrasting one with the other what state of case exists here, but I apprehend after having taken the time that I have in defining these crimes, telling you how they may be found, and when one or the
125 other exists or when neither exist, that you will be able to understand that without demonstration and definition of the other state of case where human life has been taken and there is no crime existing because of the law of self defense being applicable. If it is not applicable in this case you must find guilt of some kind or another, if that is true, and the court charges you that that is a correct position, and it becomes a question as to what is the degree of guilt in the case. If it is murder, and you are satisfied by the light of the evidence beyond a reasonable doubt that the elements going to make up the crime of murder exist, your duty of course is to find it murder, no matter what the consequence may be that ensue on account of your doing it. I want you to understand that that remark is not made for the purpose of influencing you to make a finding of that character. It is your duty to look at the facts as they are presented, and to find from these facts what is the truth of the case, and to apply to the truth of the case the exact principle of law that is applicable. If the principle of the law defining murder is the one that is applicable you, as a matter of course, must apply that principle, you must solve the problem in that way. If the principle defining manslaughter is the one applicable, in your judgment, it is your duty to make the application of that principle to the facts in the case in that way, and to thus solve the problem. In looking at the facts, there is but little contest over them. You are to take them as coming from the witnesses. We can not produce this occurrence as a tragedy is acted out upon a stage, but it is produced before you by the light of the statements given by the witnesses who saw it occur. We can only have it reproduced before us by the testimony; we can see only
126 by the light of the evidence that is offered; we must do the best we can to get at a correct conclusion by the light of the evidence and by the light of the law defining the crime. When we have done that we have done our duty; we have done the best we can. You take the statements of these witnesses and see how consistent they are in their own light,

whether the witnesses had the means of observing what they said they observed, whether they availed themselves of this opportunity, and this observation is given to you, and in that way you get at the result. You take into consideration the relation that a witness bears to the case. It is regarded by the law that when witnesses are brought in ordinarily in a case to testify to what they saw, who are not connected with the defendant by the ties of blood or in any other way, that they are ordinarily so situated as that there is nothing arising out of their condition in the case to be taken against their evidence. A man may have his sympathies or his feelings or his desires so wrought upon as to be influenced in the case. It is natural to us if one of our relatives is in a condition of danger to cling to him; he may be in the wrong, and yet we cling to him, and that is right; it is the principle of self-protection planted in all of us. And when we consider the statements of witnesses we are to weigh these statements in the light of that relation. The defendant stands before you as a man having the most powerful motive possible in the case. His interest may be strong enough, presumably, to overturn his desire for a correct vindication of the law; he is confronted with two possible results—one may give him liberty, restore him to freedom, and the other to imprisonment or to the gallows.

Then he is in an attitude where the highest consideration that can
127 ever confront any of us confronts him. He is occupying a position that may end in the taking of his life, in ending that which any and all of us will give the whole world if we possessed it to save, says the Scripture, and, therefore, if we are to be just in the performance of these great duties we must take things as they are; we must take people as they are. We can view them in no other light. Then the defendant's testimony is to be viewed in the light of his consideration, in the light of the attitude that he bears to the case, and his testimony is to be considered when you have viewed his interest in giving that evidence. Now the law contemplates that notwithstanding that he may tell the truth, and, for that reason, we are to weigh his evidence in the light of the other facts, to see if they are corroborated. If they are corroborated of course it strengthens his testimony; if they are not it leaves his testimony to be weighed upon its own inherent worth in the light of the law I have given you, directing you to weigh it. If there are facts that contradict his testimony it of course is weakened as you attach credibility to the contradicting evidence.

The facts in this case, as in all other criminal cases, are to be found beyond a reasonable doubt before the case is found at all. It has no existence in the law until it is found to that extent, to that degree of certainty. There is no mystery about that proposition at all. It is simple and easily understood. It is deducible by common observation. It is gathered up as one of those principles that enters into the system that is called the gathered wisdom of ages, by the observations upon the conduct usually by intelligent, reasonable, and dispassionate men; not men who doubt when not confronted by facts powerful enough in their proving force to satisfy
128 reasonable minds, but men whose minds are so evenly balanced as that they are placed within the category of reasonable-minded men who form conclusions such as reasonable men would form and act upon. That is exactly this rule I have given to you, as a rule required to prove beyond a reasonable doubt. Now, of course, that contemplates that men have minds of a certain character; that they are not men, of course, who are so

skeptical that they doubt everything, and especially when it is supported by circumstances. It has been said by those who have reflected upon His life and career on earth that the great good, that the great benefit that the Saviour of the world did to mankind was to portray so we could see it every characteristic of our nature. He gave us the avaricious man. He give us the man so avaricious that he was a thief. He gave us the character of man who had a heart that would prompt him to murder. He gave us the character of a man who was a doubting man; he was the man that would not believe upon circumstantial evidence—yea, he refused to believe when he saw the holes in His hand, and the holes in His side, because he had not seen the Saviour come up from the tomb; he would not believe that it was the Saviour; and He thus gave us the doubting Thomas, the skeptical man, the man who did not believe, and who was not satisfied with proof beyond a reasonable doubt. We, presumably, in this age of the world, do not have any doubting Thomases on juries, or ought not to have, at least. We have evenly balanced minded men who will view the proposition by the light of the circumstances as well as by the light of the positive facts, and when these positive facts or these circumstances carry the mind to the point where its possessor is able to say, I have an abiding conviction to a moral certainty of the truth of the
129 charge, it is proven in the law, it is established. If it is not carried that far it is left in a condition where there is confronting the truth of the proposition, a real substantial doubt of guilt, and not a mere conjecture as to the possibility of innocense, then the case in condition of such doubt as you may act upon it, because it is then a real substantial doubt that you may depend upon, and not a doubt based upon mere surmise or conjecture that you are not to regard in a case.

I ask you to take the case, and ask you to find what crime exists in this case, to characterize it correctly whatever it may be, and when you do that you are enforcing the law and carrying out its provisions.

You may retire to make up your verdict.

Mr. FREDERICK (of counsel for defendant). Upon the question of the good character of the defendant——

The COURT. Yes; the jury are to take into consideration his good character, yet you are instructed that you can not acquit upon good character alone, but you take it into consideration as a circumstance together with the other facts in the case.

3:00 p. m.

130 To which charge in all its partst he defendant at the time excepted, which exceptions were by the court overruled.

The defendant especially excepted to the following parts of said charge, viz:

"In order to give the party the right to claim that his act is manslaughter, there must be a condition of hast' passion. That is one condition that alone cannot reduce the man's crime, because there is passion. It is sometimes hasty when a man slays in the most murderous way; there is a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition where he contemplates the rights of others and observes those rights, but it is in a condition of fury. He frequently creates that condition by the use of stimulants, nerves

himself up for the very purpose. When he does it, it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there is no time for the passion of the party to cool. That is what it means, and the offense is mitigated because of the wrongful act of the other party who is committing that act at the time of the slaying. Now, as I have already told you, substantially, if the other party is doing a wrongful act at the time he is slain, and when I speak of a wrongful act, I speak of one that would give the party the right to defend to the death, and the slapping
131 of the boy in this case, or the controversy he had with his brother, would not do that, because if violence of that character was done to the defendant, it wouldn't give him the right to slay, nor would it give him the right to slay him when it was used on his own brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where he his life is imperilled, and use the same violence as he would in his own case. But suppose that dering the time that condition existed, and the doing of the act has a tendency to infuriate the mind of the party, if he then, without previous preparation or without preparation at that time should take the life of the deceased, that would be manslaughter."

Which exceptions were by the court overruled, to which ruling by the court the defendant at the time excepted.

The jury then returned a verdict of guilty of murder.

The defendant then moved the court to set aside the verdict and grant him a new trial, which is in words and figures as follows:

IN THE U. S. CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

UNITED STATES)
vs.)
FRANK COLLINS.)

Now comes the defendant, Frank Collins, and moves the court to set aside the verdict in this case and grant him a new trial, and for grounds for said motion assigns the following:

1st. Because the verdict is contrary to law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the court erred in charging the law to the jury.

132 And for other good and sufficient reasons.

FRANK COLLINS, *Deft.*
FREDERICK & RUTHERFORD,
Attys. for Deft.

Which motion the court overruled and in overruling made the following remarks:

133 IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN AND FOR THE WESTERN DISTRICT OF ARKANSAS.

August term, A. D. 1892.

UNITED STATES *vs.* FRANK COLLINS. } Murder.

Ruling of court on motion for a new trial, delivered September 13th, 1892, 3:20 o'clock.

PARKER, J:

In the motion for a new trial in this case the first cause as set out is that the verdict is contrary to the law; and, second, that the verdict is contrary to the evidence. These two causes may be considered together. This case has been recently tried, and it is not necessary for the court to go into the facts in detail in this case. There can be no question, in my mind, but that the response of the jury to the charge in this case was correct. I do not see how the act of the defendant can be denominated anything else than murder. There may be extenuating circumstances that were not sufficient, however, to authorize the jury to reduce the grade of the crime. It may be possible that, under the circumstances, they may be sufficient to be considered by the Executive power for that purpose, but the jury took a proper view of it. You take a case where the

134 law declares an act as done by a party to be murder, and the jury have no more right to compromise away the rights of the law than they have to acquit in the face of evidence showing guilt. Their purpose is to find guilt, if guilt exists, and to find what sort of guilt it is. The trouble between this defendant and the deceased originated, as it is claimed by the Government, because of impertinent and saucy language upon the part of the little brother of the defendant to the deceased, who was a grown man. The deceased became offended and used some violence upon this boy. Of course he had no right to use it, but it was violence of the character that could not excuse the defendant in taking the life of Randall, even if he had taken it then and there at the time the deceased was exercising this violence upon the boy; because it was not violence that threatened the life of the party or violence that endangered his life. If the defendant had killed him at that time, he would have been guilty of the use of excessive violence and force; in other words, he could not balance the act of chastisement that was given at the hands or fists, as the case may be, of this man who was killed, Randall Lovely, to his little brother, against the life of Lovely. That is a very clear proposition.

There was some discussion when this motion for a new trial was argued as to error alleged to have been committed by the court on the subject of previous preparation, or what showed deliberation and what showed malice aforethought. The defendant did not have the pistol in his belt at that time or in his pocket, but he went and got it. If that act was not in the

language of the law the deliberate selection of a deadly weapon, I can not understand what it was. It was just as much the deliberate selection of
135 a deadly weapon as though he had prepared it a month before, in my judgment. He got it from another party, though it is true it was the defendant's own pistol. He went to where this other party was in order to get it, thus having had sufficient time to deliberate and conceive a deadly purpose, which he did conceive, and must have conceived, because when a man acts in that way, going and getting a deadly weapon and then uses it, the law does not permit him to say that he had any other purpose than a deadly purpose. Of course, he may have a deadly purpose and it may be an excusable purpose. He may get it to defend himself, but he could not invoke the law of self-defense in that sort of case for the violence against his brother when he exercised violence of that kind against the deceased. He could not do that. Therefore, you can attribute this preparation of the weapon to a purpose to kill, and if he had no right to execute such purpose you must find, as the law commands you to do, that he deliberately selected that weapon with the purpose to kill, and consequently whenever that exists, and there is evidence of deliberation, evidence of being thought of beforehand, whether it is at the moment or whether it is for an hour or a month or a day, it shows deliberation, shows premeditation, and it shows malice aforethought. He did get the weapon, and fired upon this man, who fell gasping for breath, and the defendant started to walk away, and afterwards walked back and fired deliberately at the head of the dying man the second time when the man was gasping in the agonies of death. It was not only the right, but it was the duty, of the jury in seeking to characterise this act to look to this second firing, because there is
no manner of excuse that could be offered for that. There is no pos-
136 sible state of case where there could be at that time any danger to the defendant's brother or to himself, and it goes to show that the act was a deliberate act; it goes to show that it was an act wickedly done, and that it was an act that can not be excused. There is no question about the principle of the law that whatever shows deliberation, whatever shows thought of beforehand, shows malice aforethought, in the absence of a state of case where a man has no right to make this previous preparation to defend himself. Of course, a man might see danger afar off; he might be in his house at night; he might have knowledge of coming danger, and he would go and prepare himself to shoot the burglar or assassin who was coming to steal from him or to take his life, and that would be previous preparation. Previous preparation does not alone show a state of malignancy that is criminal, but it shows it in a case where a party has no right to do an act. These two things are the test. If the act is an act that is wantonly done by him, he has no right to do it, and he prepares himself for doing the deadly act beforehand, in the language of the law as laid down by Mr. Greenleaf and by all authorities upon the subject, and by none clearer than those that were referred to in this case, where it is said that express malice is proved by evidence of a deliberate and formed design to kill another. Was there a deliberately formed design upon the part of this defendant when he walked away to get that pistol to kill this man? There was the doing of an act that might kill, and which does kill, usually, and consequently he had contemplated that purpose. That may be shown, the law says, from the circumstances attending the act, such as the

deliberate selection and use of a lethal weapon, knowing it to be
137 such, just as the defendant did. I think that principle was correctly enunciated by the court in the charge to the jury. Here is what it said on that occasion: "If a person being in the possession of a deadly weapon"—now, that is exactly when the defendant had it, at the time of the killing—"enter into a controversy with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be murder, but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter."

The court then read to the jury the case of R'gina v. Smith (8 Car. & Pay., 160), because that is a case, in my judgment, directly in point and illustrative of the principle of the proposition invoked in this case. In the charge of the court to the jury the court further said;

"Again, we have the statement of the principle in another case, a case decided by the supreme court of North Carolina, The State v. Scott (4 Iredell, 409), where Chief Justice Ruffin lays down this principle:

'In a case of mutual combat upon words of reproach or other sudden provocation, if one of the parties takes an undue advantage, as by drawing his sword and making an assault, before the other has an opportunity to draw his, it is settled that it is murder. And so here, where one of the parties drew his knife without notice to the other, who expected only a fight, without weapons, as the other knew, it would seem, even if they actually engaged in the fight, that the former stabbing the other must be murder; for it is plain that the slayer intended a fight as well as the other, but he did not intend a fair fight, as a trial of natural strength, but sought the other's blood.'"

Now, a word in reference to the charge of the court upon the subject of preparation, commencing on the bottom of page 30 of the charge:

"But suppose that during the time that condition exists, and the doing of the act has a tendency to infuriate the mind of the party, if he then, without previous preparation at that time, should take the life of the deceased, that would be manslaughter. But if he prepared himself with a deadly weapon, showing a preconceived design to do an act of a deadly character, prepares himself with a deadly weapon, and uses it when it was
not necessary to be used to save life, or to prevent great violence,
138 the fact of the deliberate selection and use of the deadly weapon puts it out of the category of this definition of manslaughter, because that is a state of case where the purpose of killing springs into existence as an effort or desire of an inflamed condition of the mind, and where it can not spring into existence because of previous preparation, or a preconceived design to use a deadly weapon. Now, if two men," etc.

I think the whole charge together states that proposition correctly.

I do not think there is any ground in this case for interference. There is this in favor of the defendant, I will state here in this connection—his age as compared with that of the other man, and that the other man was a reckless man, who engaged in difficulties without hesitancy, but these are things that are outside of the law, and are outside of the facts in the case. There are not sufficient grounds to authorize the court to interfere with the verdict, and the motion will be overruled.

Defendant excepts.

139 To all of which the rulings of the court the defendant at the time excepted and tenders this his bill of exceptions and prays that the same be signed and made a part of the record in the case, which was accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding the Circuit Court.

140 UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

August term, 1892.

UNITED STATES }
vs.
FRANK COLLINS. }

Assignment of errors.

The defendant in the above entitled cause files this, his assignment of errors committed on the trial of said cause, to wit:

1st. It was error to charge the jury the following:

"In order to give the party the right to claim that his act is manslaughter, there must be a condition of hasty passion. That is one condition; that alone can not reduce the man's crime, because there is passion. It is sometimes hasty when a man slays in a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition where he contemplates the rights of others and observes these rights, but it is in a condition of fury. He frequently creates that condition by the use of stimulants; nerves himself up for the very purpose. When he does it it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there is no time for the passion of the party to cool. That is what it means, and the offense is mitigated because of the wrongful act of the other party who is committing that act at the time of the slaying. Now, as I have already told you substantially, if the other party is doing a wrongful act at the time he is slain, and

141 when I speak of a wrongful act I speak of one that would give the party the right to defend to the death, and the slapping of the boy in this case or the controversy he had with his brother would not do that, because if violence of that character was done to the defendant it wouldn't give him the right to slay, nor would it give him the right to slay him when it was used on his brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where his life is imperilled and use the same violence as he would in his own case. But suppose that during the time that condition existed and the doing of the act has a tendency to infuriate the mind of the party, if he then, without previous preparation or without preparation at that time, should take the life of the deceased that would be manslaughter."

2nd. It was error for the court to overrule the defendant's motion for a new trial.

3rd. It was error for the court to sentence the defendant.

Wherefore the above stated errors considered, the defendant prays that the judgment and sentence against him be reversed.

FRANK COLLINS,
By FREDERICK & RUTHERFORD,
His Attorneys.

142 IN THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

UNITED STATES, }
FRANK COLLINS. } Murder.

I, Frank Collins, the defendant in the above stated case, do solemnly swear that I am not possessed of sufficient means and am not worth $10.00 above my wearing apparel and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperism.

FRANK COLLINS.

Sworn to and subscribed before me the 19th day of September, 1892.

STEPHEN WHEELER,
Clerk.
By I. M. DODGE.
D. C.

143 *Petition for writ of error.*

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DIST. OF ARKANSAS.

August term, 1892.

UNITED STATES, PLAINTIFF, }
vs. } Murder.
FRANK COLLINS, DEFENDANT. }

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Frank Collins, respectfully represents that at the August term, A. D. 1892, of said court he was convicted on an indictment charging him with the crime of murder, and that said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid; your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said

cause, removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and if error be found that the judgment and sentence against him therein may be reversed.

FRANK COLLINS,
By FREDERICK & RUTHERFORD,
His Attorneys.

144 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Frank Collins and the United States of America, a manifest error hath happened, to the great damage of the said Frank Collins, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, chief justice of the said Supreme Court, the 21st day of Sept'r, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.]

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

145 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William H. H. Clayton, esq., United States district attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Frank Collins, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac C. Parker, judge of the district court of the United States, this 21st day of Sept'r, in the year of our Lord one thousand eight hundred and ninety-two.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

I, Wm. H. H. Clayton, U. S. dist. atty. for the western district of Arkansas, do hereby accept service of the within citation, this 21st day of September, 1892.

WILLIAM M. MELLETTE,
Asst. U. S. Atty., West. D. Ark.

146 UNITED STATES OF AMERICA,
Western district of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States in and for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the record in the case of United States versus Frank Collins, convicted of murder at the August term, 1892.

[SEAL.] STEPHEN WHEELER,
U. S. Circuit Clerk for Western Dist. of Ark.

By I. M. DODGE,
Deputy Clerk.

147 (Indorsed on cover:) Case No. 15149. Term No. 1179. Frank Collins, plaintiff in error, vs. The United States. Filed September 29th, 1892. W. Arkansas C. C. U. S.

Office Supreme Court U. S.
FILED.
OCT 4 1893
JAMES H. McKENNEY,
CLERK.

821

No. 1179.

IN THE SUPREME COURT OF THE UNITED STATES

FRANK COLLINS, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Attorney for Plaintiff in Error

J. M. CAIN ARTIST PRINTER FT. SMITH.

No. 1179.

IN THE SUPREME COURT OF THE UNITED STATES

FRANK COLLINS, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

Plaintiff in error was indicted at the February Term, 1892, in U. S. Circuit Court for Western District of Arkansas, for the murder of Randle Lovely. He was tried at the August term 1892, and convicted of murder. He filed his motion for a new trial, which was by the court overruled. He then took a bill of exception, filed his assignment of errors and brought this case to this court by writ or error.

The facts of the case are briefly as follows:

In July, 1891, the colored people had a dance at Fort Gibson, in the Cherokee Nation, I. T. Defendant's brother, a little boy about 12 years of age, was keeping a lemon-

ade stand at the dance. Deceased was there under the influence of liquor. He bought a bottle of soda water from the little boy and refused to pay for it. The little boy asked him for the pay and deceased, who was a man 22 years of age, slapped him. At this point, the defendant shot deceased. Deceased fell and the defendant immediately fired another shot, at deceased, saying, "I will learn you how to cut my brother with a knife." Defendant was 18 years of age. *Record pages 6 to 16.*

See also Walter Shannon's evidence R. pages 43 to 48.

The 1st assignment of error, and the only one which we rely upon, is to the following charge of the court to the jury:

"In order to give the party the right to claim that his act is manslaughter, there must be a condition of hasty passion. That is one condition; that alone can not reduce the man's crime because there is passion.

"It is sometimes hasty when a man slays in the most murderous way there is a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition when he contemplates the rights of others and observes these rights, and it is in a condition of fury. He frequently creates that condition by the use of stimulants, nerves himself up for the very purpose. When he does it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there is no time for the passion of the

party to cool. That is what it means, and the offence is mitigated because of the wrongful act of the other party who is committing that act at the time of the slaying. Now, as I have already told you substantially, if the other party is doing a wrongful act at the time he is slain, and when I speak of a wrongful act, I speak of one that would give the party the right to defend to the death, and the slapping of the boy in this case, or the controversy he had with his brother would not do that, because, if violence of that character was done to the defendant it would not give him the right to slay, nor would it give him the right to slay him when it was used on his brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where his life is imperilled and use the same violence as he would in his own case. But suppose that during the time that condition existed and the doing of the act has a tendency to infuriate the mind of the party, if he then without previous preparation, or without preparation *at that time* should take the life of deceased, that would be manslaughter." *Record pages 79, 80 and 84.*

ARGUMENT.

In State vs. Fitzsimmons, 63 Iowa, 657, it is said: "One who in the day time, in the presence of bystanders to whom he might have appealed for protection, shoots an unarmed drunken man with whom he is struggling, and from whom he is in possible danger of receiving a thrashing, and after once shooting him, follows as he may, and shoots him again, is guilty of manslaughter."

The court should have charged the jury on the ques-

tion of manslaughter, and the provocation for it, to look to the age of the parties—the youthfulness of the defendant and his little brother who was assaulted and whom defendant was trying to defend.

"An assault by the deceased, when not a justification or excuse may still be sufficient provocation to reduce the killing to manslaughter; and ordinarily the provocation is complete when the person of the defendant (or that of his little brother in this case) is touched, with apparant violence whether the assailant is armed or not."

9 Am. and Eng. En. Law, 582.

"It has been held that the sudden killing of defendant's friend, causing rage and resentment, making the mind incapable of cool reflection is a provocation sufficient to reduce the killing of the slayer by defendant from murder to manslaughter.

Moore vs State, 9 S. W. Rep. 610.

The court told the jury that "if the other party (the deceased) is doing a wrongful act at the time he is slain, and when I speak of a wrongful act, I speak of one that would give the party the right to *defend to the death* * * * * * * * it wouldn't give him the right to slay, etc., etc., thus in effect, and as the jury no doubt understood him—he told the jury that defendant must act in defense of his own life before it would be reduced to manslaughter. The law of manslaughter does not require a defendant to wait till his life is in peril before he can slay—that is the law of self-defense. But a killing done in the heat of passion en-

gendered by a provocation from deceased is manslaughter and not murder. The learned court below told the jury that the killing must have been done "without previous preparation, *or without preparation at that time.*"

Record pages 80 and 84.

"Where death ensues, in heat of blood, on immediate provocation, there having been no previous malice, the offense is manslaughter."

2 Whart. Cr. Law Sec. 985, 6 2d.

The State vs Abarr, 39 Iowa, 185, was a case of stabbing by defendant who had secretly drawn his knife at the time of a sudden quarrel and mutual combat. This act was held manslaughter and not murder.

Irby vs State 32 Ga. 496.

State vs Davis 1 Houst. Cr. Cas. Del. 13.

A blow with the hand may or may not afford sufficient provocation to reduce the crime of killing to manslaughter.

Stewart vs State 78 Ala, 436.

It is not necessary that the act done by deceased should have been such "as to *infuriate* the mind" of defendant as charged by the court—or that the reason be dethroned, but there must be sudden passion upon reasonable provocation to negative the idea of malice.

State vs. Hackett, 73 Iowa, 442.

We think that in view of his youth, and the provoca-

tion originated by the brutal assault of a man 22 years of age upon a little boy 12, the defendant is not guilty of more than manslaughter, and we think the jury would have so found if the law had been correctly charged to them.

Respectfully Submitted,

A. H. GARLAND,

Attorney for Plaintiff in Error

Office Supreme Court U. S.
FILED.
OCT 9 1893
JAMES H. McKENNEY,
CLERK.

CASE No. 15149.

Supreme Court of the United States.

OCTOBER TERM, 1893.

FRANK COLLINS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 821.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

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A. H. GARLAND,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

Supreme Court of the United States.

OCTOBER TERM, 1893.

FRANK COLLINS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 821.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Frank Collins, the plaintiff in error, "a negro and not an Indian," was indicted in the circuit court of the United States for the western district of Arkansas for the murder of one Randall Lovely, in the Indian country, within the western district of Arkansas (p. 1).

The evidence, as detailed in the bill of exceptions (pp. 5–58), shows that the homicide occurred in a low resort at Fort Gibson, where a number of men and women had come together for a dance on the night of July 17, 1891.

The homicide grew out of a difficulty between the deceased, Randall Lovely, and Walter Shannon, a half-

brother of the accused, and referred to in the testimony as a little boy.

The boy was tending a "soda pop or confectionery stand" in the room where the dance was going on. The deceased, who was drunk, took a bottle of "soda pop," drank it off, and refused to pay for it. Words passed between him and the boy, who, according to the witness Vann (p. 37), said "You son of a b——h, you have to pay me." The deceased turned upon the boy, saying, as the boy testified (p. 44), "God d——n you, I will slap the devil out of you," and began slapping at and slapping him, the boy crying and retreating and the deceased following him, and with such energy that the boy testified he would have jumped out of the window behind the stand if he had not been so hard pressed (p. 44).

Observing what was going on, the accused ran some 20 feet and got his pistol out of the pocket of one Turner, as he lay asleep, and to whom accused had handed it for convenience, before beginning to dance, and then, without saying a word, accused shot deceased in the neck, inflicting a wound from which he died in a few minutes. The deceased, on receiving the shot, sank down between the confectionery stand and the wall, into which situation his pursuit of the boy had led him, the only words he uttered being, "Catch him," or "Steadman, catch him."

After firing the shot and proceeding a few steps, the accused returned and fired a second time at deceased, as he lay helpless and gasping for life, and punching the pistol down at his head (p. 26) said, as he fired, "*I have*

pretty near killed him; I may as well finish him; I will learn you how to cut my brother." (P. 17.)

The witness, Vann (p. 38), thus describes the whole scene:

> After he shot him he fell right down between the wall of the house and the table; right down kind of on his knees like, and Collins he stepped off 4 or 5 steps, and he said "I have shot him down, and, by God, I may as well finish him." And he steps up again and he fired the next shot, and that ball went through the rim of his hat.

After firing the second shot, accused walked coolly away, and was not seen again in Fort Gibson until after his arrest.

It is perfectly clear that deceased *used no weapon and had none about his person*, but struck the boy with his *open hand*, and not his fist. And there is not a particle of evidence to show that there had been any difficulty between deceased and accused.

At the time the shooting occurred, the boy was between 12 and 13 years of age, deceased was about 30, and accused about 18.

The jury found the accused guilty of murder, as indicted (p. 4), and there was judgment on the verdict (p. 5).

ARGUMENT.

It appears from the judge's charge (p. 72) that the effort of the prisoner, on the trial, was to bring his offense within the degree of manslaughter, which was clearly his only hope, and it was in the course of the judge's observations to the jury on the nature of that crime that the expressions occurred that are the subject of the prison-

er's exception. They were intended to illustrate the following definition of manslaughter, which the judge seems to have taken from some authority (Charge, Rec., pp. 73, 74):

> The law says: Voluntary manslaughter is the unlawful killing of another without malice, upon sudden quarrel, or in the heat of passion. For example, where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they upon such occasion go out and fight in a field; for this is one continued act of passion. So, also, *if a man be provoked by any gross indignity*, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo*. In these and such like cases the law, kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt the cool, deliberate act and the result of hasty passion.

The judge's comment on this definition was as follows:

> In order to give the party the right to claim that his act is manslaughter there must be a condition of hasty passion. That is one condition that alone can not reduce the man's crime, because there is passion. It is sometimes hasty when a man slays in the most murderous way; there is a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition where he contemplates the rights of others and observes these rights, but it is in a condition of fury. He frequently creates that condition by the use of stimulants, nerves himself up for the very purpose. When he does it it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there was no time for the passion of the party to cool. That is what it means, and the offense is mitigated because of the wrongful act of the other party, who is committing that act at the time of the slaying. Now, as I have already told you, substantially, if the other party is doing a wrongful

> act at the time that he is slain—and when I speak of a wrongful act I speak of one that would not give the party the right to defend to the death, and the slapping of the boy in this case, or the controversy he had with his brother, would not do that, because if violence of that character was done the defendant it would not give him the right to slay, nor would it give him the right to slay him when it was used on his brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where his life is imperiled, and use the same violence as he would in his own case. But suppose that during the time that condition existed, and the doing of the act has a tendency to infuriate the mind of the party, if he then, without previous preparation, or without preparation at that time, should take the life of the deceased, that would be manslaughter.

This was in effect to charge the jury that the act of the deceased in slapping the prisoner's little brother, while it gave no warrant to slay, had a tendency to infuriate the prisoner's mind, and make the killing of the deceased, done under this accession of passion, no more than manslaughter, *unless there appeared to be some preparation for the act, whether before or at the time of its occurrence.*

The question is as to correctness of the qualification. The judge followed the qualifying passage by saying, that if the accused—

> prepared himself with a deadly weapon, showing a preconceived design to do an act of a deadly character, prepares himself with a deadly weapon, and uses it when it was not necessary to be used to save life, or to prevent great violence, the fact of the deliberate selection and use of the deadly weapon puts it out of the category of this definition of manslaughter, because that is a state of case where the purpose of killing springs into existence as an effort or desire of an inflamed condition of the mind, and where it can not spring into existence because of previous preparation or a preconceived design to use a deadly weapon (p. 74).

The very manner in which the accused possessed himself of his pistol suggests the stealthiness and preparation of malice and not the headlong fury of passion, for when he saw the deceased slapping, or slapping at, his little brother, the prisoner ran some 20 feet, got his pistol, and fired, *without uttering a syllable*, as he, probably, would have done if he had acted in a transport of passion.

There was other evidence strongly tending to show that the prisoner acted from malice and not from passion; among the rest, the evidence of the cool and deadly ferocity that characterized the second shot, which followed the first in two or three minutes, and which was proper to be considered by the jury as bearing upon the state of the prisoner's mind when he fired the first shot.

All the witnesses agree that the prisoner, after firing the first and fatal shot, stepped four or five paces away and then returned and fired the second shot, with deliberate aim, saying, "*I will learn you how to cut up my brother with a knife*," as Steadman testifies (p. 7), or "*I have pretty near killed him; I may as well finish him; I will learn you how to cut my brother*," as Ross testifies (p. 17). Rider says that about a couple of minutes after the first shot he walked up and asked, "Who is this doing all this shooting up here?" and that the prisoner turned and walked away from the table with the pistol in his hand, and he said, '*I almost killed him, and I may as well finish him*,' and he turned around and *punched the pistol down at his head*, and fired again, *and then walked on out of the house*" (pp. 25, 26). Thompson testifies that after the second shot prisoner said, "*I will learn you* how to be trying to cut up my little

brother with a knife," (p. 29). Vann testifies that after deceased was shot "he fell right down on his knees like, and Collins he stepped off four or five steps, and he said 'I have shot him down and, by God, I may as well finish him,' and he steps up again, and he fired the next shot, and that ball went through the rim of his hat" (p. 38).

The evidence is uncontradicted that after the second shot was fired the prisoner walked coolly out of the room and was seen no more at Fort Gibson until brought back there under arrest.

In view of this evidence as to the state of the prisoner's mind and his preparation for the fatal shot, it was proper, we submit, for the judge to qualify his observations about manslaughter by saying that the provocation given by the deceased would not reduce the killing to that offense if the jury should find that the prisoner prepared for the act either previously or at the time of its occurrence.

We are told by a great authority in criminal law that it may be inferred that one who kills another on a sudden quarrel was master of his temper and guilty of murder "*if, after the quarrel,* he fell into other discourse *and talked calmly thereon*" (1 Hawk. P. C., Bk. 1, ch. 31, sec. 23, 6th Ed., by Leach, London, 1777); but how much stronger is such evidence when, as here, the slayer *talks calmly about the killing itself!*

The prisoner has no ground to complain of the charge of the court, for the law was laid down more favorably for him than he had a right to ask. The jury were told that, in the absence of any preparation for the killing, the provocation offered by the deceased was sufficient to

reduce the prisoner's offense to manslaughter; whereas, as we apprehend the law, the use of a pistol to repel mere slaps with the open hand was so disproportionate to the provocation offered as to be, of itself, proof of malice; certainly, unless the jury should find that the prisoner's mind was actually swayed by passion (2 Bish. Cr., sec. 699), of which there appears to be no evidence.

The passage quoted in the brief of the counsel for the plaintiff in error (p. 3) as being taken from the case of *The State* vs. *Fitzsimmons* (63 Iowa, 657), appears to be the product of the imagination of the counsel who prepared the brief. No such statement nor any discussion or definition of the crime of manslaughter is found in the case referred to. It is the case of a prisoner convicted of manslaughter, who appealed to the supreme court of Iowa under a law of that State, upon the ground that the punishment imposed upon him by the district court was excessive. The supreme court after reviewing the facts affirmed the judgment of the lower court, saying (p. 658):

> We think his conduct indicated an entire recklessness of consequences, and that the best interests of society demand that he should be punished with some degree of severity.

Counsel for the plaintiff in error, on page 4 of their brief, say:

> The court told the jury that "if the other party (the deceased) is doing a wrongful act at the time he is slain—and when I speak of a wrongful act I speak of one that *would* give the party the right to defend to the death," etc.

This is a misquotation, repeated in the assignment of errors, as will be seen by reference to the charge (Record

73, last line, and 74, first line). The language used by the trial judge was this:

> When I speak of a wrongful act I speak of one that would *not* give the party the right to defend to the death.

In quoting the passage the counsel for the plaintiff in error leave out the word "not." The correction of their quotation removes the ground for their criticism of the judge's charge in that connection.

Counsel for the plaintiff in error also say, in their brief, page 4:

> The court should have charged the jury on the question of manslaughter, and the provocation for it, to look to the age of the parties—the youthfulness of the defendant and his little brother who was assaulted and whom defendant was trying to defend.

But no such charge was requested, and the exception, which is the sole basis for this writ of error, has no relation to the point suggested.

A reading of the entire charge shows that the court pointed out clearly and repeatedly that malice was essential to the crime of murder, and that unless there was malice aforethought the crime could not rise above manslaughter. One who goes to a dance with a loaded revolver and uses it upon the slight provocation offered to this prisoner, and with the coolness and ferocity which he displayed, has no just ground of complaint against a conviction of murder.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

150 U.S. 65

RECORD, CASE NO. 15335.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 951.

THE UNITED STATES, APPELLANT,

vs.

JOHN T. PATTERSON.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 14, 1893.

RECORD, CASE NO. 15335.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 951.

THE UNITED STATES, APPELLANT,

vs.

JOHN T. PATTERSON.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JOHN T. PATTERSON
v.
THE UNITED STATES. } 17702.

I. Petition, filed July 12, 1892.

To the honorable the Court of Claims:

The claimant, John T. Patterson, respectfully represents: The claimant is, and has been for many years last past, a commissioner of the circuit court of the United States for the western district of North Carolina.

As such commissioner he performed certain official services from the 10th day of July, 1886, to the 10th day of July, 1892, for which he failed to make full and proper charges in his accounts as rendered to the accounting officers of the Treasury Department at the time said services were actually performed, for the reason that said accounting officers would not then have allowed such fees.

Said services consisted of "hearing" and "examining" complaining witnesses and any other witnesses produced by them in support of their allegations, as to the nature and character of the offences charged, and "deciding" as to whether a warrant should or should not issue upon the complaint made, as claimant was required to under the laws of his State.

2 For said services he now charges at the rate of *of* $5.00 per diem, and his account as computed amounts to the sum of five hundred and forty dollars ($540.00).

No other action than aforesaid has been has on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant claims the sum of five hundred and forty dollars ($540), besides costs.

GEORGE A. KING,
Attorney for Claimant.

STATE OF NORTH CAROLINA,
County of Cherokee:

John T. Patterson, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

J. T. PATTERSON.

Subscribed and sworn to before me this 9 day of July, 1892.
[SEAL.]
A. S. HILL,
Clerk Superior Court.

3 II. Traverse, filed March 22, 1893.

And now comes the Attorney-General, on behalf of the United States and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha' not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

4 III. Findings of fact and conclusions of law, filed April 27, 1893.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant, John T. Patterson, has been a commissioner of the circuit court of the United States for the western district of North Carolina since the 6th day of July, 1875.

II.

As such commissioner he performed certain official services for the defendants from the 20th day of July, 1886, to the 14th day of March, 1892, consisting of hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses, and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made.

III.

For such services complainant prepared his account and presented the same through and in the presence of the United States district attorney for the said western district of North Carolina to the circuit court of the United States for the said district for approval, and an order was thereupon entered approving the same, as being in accordance with law and just.

IV.

Said account and time so employed, computed at the rate of $5 per day, to wit, 106 days, amounts to the sum of five hundred and thirty dollars ($530).

Conclusion of law.

Upon the foregoing findings of fact a majority of the court determines as a conclusion of law that the claimant is entitled to recover the sum of five hundred and thirty dollars ($530).

BY THE COURT.

Court filed no opinion in this case.

JOHN RANDOLPH,
Asst. Clk C. C.

5 IV. Judgment of the court.

JOHN T. PATTERSON
v.
THE UNITED STATES. } 17702.

At a Court of Claims held in the city of Washington on the 27th day of April, 1893, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, John T. Patterson, do have and recover of and from the United States the sum of five hundred and thirty dollars ($530).

BY THE COURT.

6 V. Application for and allowance of an appeal.

From the judgment rendered in the above-entitled cause on the 27th day of April, 1893, in favor of claimant, the defendants, by their Attorney-General, on the 7th day of June, 1893, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Asst. Attorney-General.

Filed and allowed in open court June 7, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

7 In the Court of Claims.

JOHN T. PATTERSON
vs.
THE UNITED STATES. } No. 17702.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 10th day of June, 1893.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsed on cover:) Case No. 15335. Court of Claims. Term No. 951. The United States, appellant, vs. John T. Patterson. Filed June 14, 1893.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
vs.
JOHN T. PATTERSON,
No. 951.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

CHARLES C. BINNEY,
Assistant Attorney,
J. E. DODGE,
Assistant Attorney-General,
For Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
vs.
JOHN T. PATTERSON. } No. 951.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

I.

STATEMENT OF THE CASE.

The appellee, John T. Patterson, has been a commissioner of the circuit court of the United States for the western district of North Carolina since July 6, 1875. As such commissioner it was his duty, whenever complaint was made to him that a criminal offense had been committed within his district against the United States, to examine on oath the complainant and his witnesses, if any, and if it appeared from such examination that any

such criminal offense had been committed, to issue a warrant for the arrest of the person or persons charged with the commission of such offense.

On November 7, 1892, the appellee presented to the said circuit court, through the United States district attorney, an account for certain official services from July 20, 1886, to March 14, 1892, for which he had omitted to make charges in his accounts previously rendered to the accounting officers of the Treasury Department, for the reason that the said officers would not then have allowed these charges. These services were the examination of the complainant and his witnesses, if any, in cases of complaints made as above described, and the account was for one hundred and six days employed in the performance of these services at $5 per day, the total account being $530.

The said circuit court approved this account, whereupon the appellee filed his petition in the Court of Claims on July 12, 1892, to recover the amount alleged to be due by the said account, and the Court of Claims found *inter alia*, as follows:

> As such commissioner he [the appellee] performed certain official services for the defendants from the 20th day of July, 1886, to the 14th day of March, 1892, consisting of hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses, and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made.

A majority of the said court determined as a conclusion of law that the appellee was entitled to recover the sum of $530, and the said court accordingly, on April 27, 1893, entered judgment in his favor and against the United States for $530, from which judgment the United States, by their Attorney-General, appealed to this court, the appeal being duly allowed June 7, 1893.

II.

SPECIFICATIONS OF ERROR.

The Court of Claims erred—

1. In not finding that the examination of complaining and other witnesses, by a commissioner of a circuit court of the United States, prior to any arrest of the person or persons against whom complaint is made, and the subsequent issuing or non-issuing by such commissioner of a warrant of arrest in consequence of the complaint, do not constitute a "hearing and deciding on criminal charges" within the meaning of Revised Statutes, § 847.

2. In finding in the claimant's favor for the sum of $530.

III.

BRIEF OF ARGUMENT.

The whole case turns on the meaning of the following clause in the Revised Statutes, § 847, providing for commissioners' fees:

> For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

The appellee's contention is that the examination of the complaining party and his witnesses in support of a criminal complaint is a "hearing" on a criminal charge, and that the determination of the question whether or not any criminal offense is really charged constitutes a "deciding" on a criminal charge.

Did the case admit of a serious doubt, that doubt should be resolved in favor of the United States rather than the commissioner appellee (*United States* v. *Clough*, 55 Fed. Rep., 373), but it is submitted that the words "hearing and deciding on criminal charges" cannot possibly refer to any duties which a commissioner is required to perform prior to the actual arrest of the person charged. When such person is arrested and brought before a commissioner, then, and not till then, is there a hearing and a decision on the charge made against him.

The word "hearing" has an established meaning in criminal law. It is "the examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused" (Bouvier's Law Dict.; Black's Law Dict.), or, as another writer puts it, "the preliminary examination of a prisoner charged with a crime, and of witnesses for the prosecution and defense." (9 Am. and Eng. Cyc. of Law, 324.)

So Dr. Wharton, in writing of the mode of beginning of a criminal proceeding, says:

> The usual commencement of a criminal procedure is a preliminary oath before a magistrate, upon which, if it appear on the face of such oath that a criminal offense has been committed by the defendant within the magistrate's jurisdiction, a warrant is issued for his arrest.

> The delinquent having been arrested, the next step is to have the case heard before a magistrate or justice of the peace. (Wharton's Criminal Pleading and Practice, §§ 1, 70.)

Throughout his book Dr. Wharton never uses the word "hearing," except in this one sense of a hearing before a magistrate after the arrest of the accused, and in point of fact this is the universally accepted meaning of the word as used in criminal proceedings. The proceedings prior to an arrest are popularly denominated "swearing out a warrant," but never a "hearing."

Whatever degree of judgment on the part of a commissioner such proceedings involve is confined to ascertaining whether a criminal offense against the United States is charged. If it is, he has no discretion, but must make out a warrant in accordance with the complaint. This latter act is substantially clerical, and certainly the former, which may consist merely in reading over the complaint presented, can not rise to the level of the judicial. For whatever work may be involved—administering oaths, writing out testimony, preparing the complaint, issuing the warrant—a commissioner receives compensation. To entitle him to a per diem in addition for the same work, and whether that work be little or much, would have needed language so explicit as not to require the interpretation of this court.

A claim of precisely the same character as the present was disallowed by the Court of Claims in *Ives* v. *United States* (24 C. Cls. R., 363), and in *McCafferty* v. *United*

States (26 C. Cls. R., 1). In the former case the court said of the clause of § 847 here in question—

> This statute evidently contemplates an act in its essence judicial, not clerical. At the examination of complaining witness prior to issuing warrant there was no reason why counsel should be present; the defendant was not before the commissioners, there were no matters in controversy. That the intent of this provision of the statute was to provide compensation for a hearing and decision after warrant issued and returned, and with the defendant before the commissioner, is shown by the subsequent provision in the same section giving a fee "for issuing any warrant or writ." The service performed by the plaintiff was this service; he issued warrants, and for performing that duty is entitled to a definitely specified fee, which must be held to include compensation for all labor necessarily incident to the duty of issuing a warrant or writ, such as hearing the statement of the complaining witness.

In the latter case (*McCafferty* v. *United States*, 26 C. Cls. R., 1) the same interpretation was given to § 847. The court said:

> By the law, subject to certain regulations, it is the duty of the commissioner to issue a warrant when a sufficient affidavit or complaint is made, and before he performs that duty he must necessarily pass upon the sufficiency of the allegations on which the party is to be arrested; but the performance of that duty can not by any fair reasoning be construed to be 'hearing and deciding on criminal charges' within the meaning of the statute. Hearing a criminal charge implies a judicial hearing, and deciding a criminal charge implies a judicial determination after a hear-

ing. After the defendant is arrested and brought before the commissioner, if a motion is made to dismiss the prosecution because of the insufficiency of the complaint, hearing and deciding that motion would in its nature be judicial; but an examination of the complaint antecedent to the issuing of the warrant is not hearing and deciding a criminal charge, within the meaning of the statute. If the construction contended for should prevail, in every case where a warrant was issued the officer would be entitled to a per diem compensation regardless of the question whether any arrest was made or not. The commissioner is allowed a fee for issuing the warrant, and in order to do that, he must necessarily examine the complaint and determine from that examination whether it is sufficient in law to justify the issuance of process. He is also allowed compensation for preparing the complaint, and is presumed in those cases to determine the legal sufficiency of the statement of the prosecutor before he reduces it to writing. He can not intelligently reduce the charge to writing without being fully possessed of the facts, and if after hearing the facts he proceeds to reduce them to writing, by that act he determines their legal sufficiency, and for that he is paid by the folio, as for ministerial or clerical duty.

In using the expression, "for hearing and deciding on criminal charges," Congress obviously had in mind one proceeding or step in the commitment or discharge of a criminal. Taking the oath of the complainant and his witnesses, drawing the complaint (if this be not done already), and issuing or refusing the warrant form one step; while the appearance of the accused, the hearing of evidence, the granting of continuances, and ultimately

the deciding either to commit or to discharge constitute another. The above phrase could not have been intended to refer to both of these steps, for the inherent characteristics of the two differ so widely that no person having both in mind would attempt to describe them by the same expression. A double form of expression would certainly have been used had the intention existed to include matters so distinct.

This being conceded, the question of which step or proceeding is here referred to is easy of solution. The latter of the two can alone be meant. That one, and that only, has all the characteristics of a hearing and decision; at that only is the defendant present, and an opportunity given him to be heard; and at that only is the judicial decision to bind or loose him made. To that moreover, are the words held to apply by this court (*United States* v. *Jones*, 134 U. S., 483), for of that only can it be said that a motion to admit to bail or for a continuance is a part and a necessary incident.

The appellee's whole argument is built up upon a misunderstanding and misapplication of the doctrine laid down by this court in *United States* v. *Jones* (134 U. S., 483). In the opinion in that case it is said:

> For acts not merely clerical, but which are performed by the commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation.

The only acts, however, for which a per diem is allowed are attending to a reference by order of court, hearing and deciding in extradition cases, examinations on applications

for the discharge of poor convicts, and hearing and deciding on criminal charges. It is with acts of the last sort only that the present case has to do, and of them it was further said in that opinion:

> The decision upon a motion for bail and the sufficiency thereof, is a judicial determination of the very matter which the statutes authorize and require him "to hear and decide," to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged, or committed on bail for trial, and in default thereof imprisoned. With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him, and to a sufficient time for the summoning of his witnesses as well as for employing and consulting with counsel to aid him in his defense.

From the above careful and guarded language the appellee draws the unwarrantable inference that any hearing of testimony in any way connected with a criminal charge and any determination of any matter in such connection, either before or after the arrest of the person accused, are "hearing and deciding on criminal charges" within the meaning of the statute. So far from warranting such an inference, the language above quoted directly excludes the idea that there can be any "hearing and deciding," within the meaning of the statute, prior to the arrest of the accused. The court says, "the very matter"—*i. e.*, the one, the only matter—"which the statutes authorize and

require him [a commissioner] to hear and decide," is "whether a *party arrested* * * * when brought before him for examination, shall be discharged," etc.; while the exercise of the power to grant or refuse a motion for continuance is at the same time declared to be "indispensable to the right of *the accused* to have a full and fair investigation," etc. It would be difficult to use any language more clearly restricting the "hearing and deciding" to a hearing and decision after the person accused had been arrested and brought before the commissioner.

The appellee contends, however, that as this court said, as above quoted, that "for acts * * * performed by the commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation," and as Ruffin, C. J., in *Welch* v. *Scott*, 5 Ired. (12 Car.), 72, spoke of the magistrate who issues a warrant as a "judicial officer," and as in other reported cases he is referred to as "judging" or "determining," the conclusion must be that a commissioner is to have a per diem compensation for issuing a warrant.

That the duties of a commissioner in connection with the issuing of warrants are the same as those of a magistrate in the same State, must be conceded, but it does not follow that because certain judges have spoken of those duties as those of a "judicial officer," or as requiring him "to judge and determine upon questions of law," therefore these duties are among the "acts performed in his judicial capacity" referred to in *United States* v. *Jones*.

The sense in which these words were there used is clearly shown by the context, viz., as referring to the

capacity in which a commissioner (besides performing certain acts not now under consideration) hears and decides a criminal charge after the accused has been arrested and brought before him. Whether or not other judges, in other cases, used the word "judicial" of magisterial duties prior to an arrest is wholly beside the mark. The limits of the application of the term by the late Lamar, J., in *United States* v. *Jones*, are there clearly defined.

The appellee also points to the opinion of Attorney-General Black (9 Op. A. G., 170), construing the words "examination of a person charged with crime" as equivalent to "investigation of the case," and allowing a district attorney his per diem for every such investigation, whether before or after the arrest. That opinion can have no bearing on the present case unless the court is willing to disregard not only the limits put by Lamar, J., to the application of the language used by him in *United States* v. *Jones*, but also the settled meaning of the term "hearing" in criminal law, and the fact section 847 provides other and ample compensation for the duties of a commissioner before an arrest.

As to the effect of the approval of a commissioner's account by a circuit court, it is submitted that such approval was recognized in *United States* v. *Jones* as prima facie evidence that the time charged for had been actually employed as alleged, but not as an authority in determining the legality of the charge.

The appellee's claim is analogous to that made in *United States* v. *Tanner* (147 U. S., 661). Both in that case and this certain acts had been performed which could be regarded as having two phases, and compensation was